Enterprise Products Company *and* Teamsters Allied and Industrial Workers, Local No. 258. Cases 15-CA-6518, 15-CA-6560, 15-CA-6560-2, 15-CA-6780, 15-CA-7038, 15-CA-7086 and 15-RC-6140

December 1, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On July 22, 1981, Administrative Law Judge Jennie M. Sarrica issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed limited cross-exceptions, and the General Counsel and the Charging Party each filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[1] and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[3]

The Administrative Law Judge inadvertently failed to rule on the Union's objections in the representation case to the Employer's preelection conduct. As said conduct involved the same activities as the Employer's unfair labor practices in the complaint case, the Union's objections are hereby sustained and we shall order that the election held on August 26, 1977, in Case 15-RC-6140 be set aside and that the petition be dismissed.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Enterprise Products Company, Petal, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs 1(c) and (d) and reletter the subsequent paragraphs accordingly:

"(c) Discharging employees because they engage in union activities.

"(d) Laying off employees temporarily, making the layoffs permanent, and failing and refusing to recall laid-off employees because they engage in union activities."

2. Insert the following as new paragraph 2(b) and reletter the following paragraphs accordingly:

"(b) Expunge from its records any reference to the discharge of employees James J. Thomas, James T. Rouse, Lowell Mayfield, and Dennis Thornhill and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future discipline against them."

3. Delete from new paragraph 2(e) the phrase, "Post at its Petal, Eunice and Port Allen terminals," and substitute therefor the phrase, "Post at its Petal, Mississippi, terminal."

4. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held on August 26, 1977, in Case 15-RC-6140 be set aside and that the petition be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

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[1] In the absence of exceptions thereto, we hereby grant the General Counsel's motion to correct the record.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings. We also find totally without merit Respondent's allegations of bias and prejudice on the part of the Administrative Law Judge.

[3] The Administrative Law Judge inadvertently omitted from her recommended Order and notice a cease-and-desist provision regarding Respondent's unlawful discharge and layoff of a number of employees. She also inadvertently included a narrow rather than a broad order in the notice. We shall therefore make the appropriate changes herein. We shall also add an expunction remedy.

We find merit in Respondent's contention that the posting of the notice should not extend to the Eunice and Port Allen, Louisiana, terminals which are not involved in the instant proceeding. We shall so provide.

WE WILL NOT do anything that interferes with, restrains, or coerces our employees with respect to these rights. More specifically:

WE WILL NOT discourage assistance to or membership in Teamsters Allied and Industrial Workers, Local No. 258, or any other labor organization, by discharging, laying off, or otherwise discriminating against any employee with respect to hire, tenure, or any term or condition of employment because of their exercise of the above rights.

WE WILL NOT interfere with employees' efforts to seek redress under the law by discharging them for providing information to the Board.

WE WILL NOT discharge employees because they engage in union activities.

WE WILL NOT lay off employees temporarily, make their layoffs permanent, and fail and refuse to recall laid-off employees because they engage in union activities.

WE WILL NOT interrogate our employees concerning their own and the union activities of other employees; give the impression that their union activities are under surveillance; solicit grievances; threaten to close the facility, to move the terminal, to move the trucks out, to withhold planned benefits or improvements; threaten them with less favorable working relationships and threaten not to bargain with the selected representative; solicit employees to report on the union activities of other employees; promise benefits; maintain in effect and enforce an unlawfully broad rule which restricts communication concerning union activity; or state that laid-off employees will not be recalled until union activity ceases.

WE WILL NOT refuse to recognize and bargain with the above-mentioned Union as the exclusive representative of our employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer James J. Thomas, Dan Bickham, Jack Blackburn, Paul Blackburn, Daniel Carter, Abner Davis, Charlie Daw, Maurice Dickens, Steve Diem, Tommy Holden, H. Dale Purvis, Billy Reid, Ray Williams, Boyd Davis, Joe Faggard, Joe Shows, Howard Stevens, James T. Rouse, Lowell Mayfield, and Dennis Thornhill immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other privileges previously enjoyed, and WE WILL make them whole for any loss in pay they may have suffered, with interest.

WE WILL expunge from our records any reference to the discharge of employees James J. Thomas, James T. Rouse, Lowell Mayfield, and Dennis Thornhill and notify them in writing that we have done so and that evidence of our unlawful conduct will not be used as a basis for future discipline against them.

WE WILL recognize and, upon request, bargain with Teamsters Allied and Industrial Workers, Local No. 258, as the exclusive representative of our employees with respect to wages, hours, and other terms and conditions of employment; and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All truckdrivers, dispatchers, operators and mechanics at the Employer's Petal, Mississippi, facility excluding all office clerical employees, professional employees, salesmen, watchmen and/or guards and supervisors as defined in the Act, as amended.

ENTERPRISE PRODUCTS COMPANY

DECISION

STATEMENT OF THE CASE

JENNIE M. SARRICA, Administrative Law Judge: Upon due notice this consolidated proceeding under Sections 9 and 10(b) of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*) hereinafter referred to as the Act, was heard before me at Hattiesburg, Mississippi, on various dates between August 14, 1978, and March 15, 1979.

The initial charge was filed on July 5, 1977, following the filing with the Board by the Union of a petition on July 1, 1977,[1] seeking representation of a unit of employees located at Respondent's Petal, Mississippi, facility. The initial complaint alleging violations of Section 8(a)(1) and (3) was issued by the Regional Director for Region 15 on August 22. Thereafter, additional charges were filed alleging further violations of those sections of the Act. A complaint covering such charges and an order directing a hearing on objections and challenges related to an election conducted on August 26, 1977, were consolidated with the initial complaint. Charges and a complaint alleging violations of Section 8(a)(1) and (5) resulted in a further amended consolidated complaint on March 22, 1978, followed by further charges and complaints of violations of Section 8(a)(1), (3), and (4) based on events occurring while the hearing was in process. On appropriate motion and without objection these latter complaints were consolidated with the complaint

[1] All dates are in 1977 unless otherwise indicated.

underlying the ongoing hearing. Appropriate and timely answers denying the various allegations were duly filed with respect to each complaint and amended complaint. All resumptions and adjournments of the hearing were by agreement of the parties. Representatives of all parties entered appearances and those of Respondent and the General Counsel were present and participated throughout the hearing. Thereafter, both Respondent and the General Counsel filed briefs.

Based on the entire record, including my observation of witnesses,[2] and after due consideration of briefs, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent, with headquarters in Houston, Texas, is now and has been at all times material herein a Texas corporation engaged in the storage, marketing, and distribution of liquid petroleum gases at its Petal, Mississippi, terminal, the only facility involved herein. During the 12 months preceding the issuance of the complaint, a period representative of all times material herein, Respondent purchased supplies and materials valued in excess of $50,000 which were shipped directly to it from points located outside the State of Mississippi. During the same period of time Respondent sold products valued in excess of $50,000 which were shipped directly by it to points located outside the State of Mississippi. Respondent admits and I find that it is now and has been at all times material herein an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent admits and I find that Teamsters Allied and Industrial Workers, Local No. 258, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

1. Whether Respondent violated Section 8(a)(1) of the Act by: (a) Engaging in surveillance of employees' union activities; (b) giving the impression of surveillance; (c) interrogation of employees concerning the union interest and activities of themselves, and other employees; (d) threatening terminal closing and removal of the trucks; (e) soliciting grievances and threatening to withhold planned improvements; and (f) threatening not to bargain in good faith.

2. Whether Respondent violated Section 8(a)(3) and (1) by its discharge of James J. Thomas?

3. Whether Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad rule imposing upon employees an unlawful restriction upon employees' Section 7 rights.

4. Whether in enforcing this rule, by discharging three employees it suspected of supplying information relating to employee work availability to the Union and thence to the NLRB through a discharged employee, constituted violations of Section 8(a)(3) and (1) of the Act.

5. Whether the conduct referred to in paragraph 4, above, based on information, interrogatories of employees, and testimony presented during the course of this hearing constituted violations of Section 8(a)(4) of the Act.

6. Whether the layoffs of transport drivers on July 18, and August 8, 1977, were motivated by the union activity among the drivers at the terminal and therefore violations of Section 8(a)(3) and (1) of the Act.

7. Whether Respondent changed these layoffs from temporary to permanent, and, if so, whether it did so and thereafter failed and refused to recall for unlawful reasons in violation of Section 8(a)(3) and (1) of the Act.

8. Whether Respondent violated Section 8(a)(5) by unlawfully refusing to bargain with the representative of a majority of the employees in an appropriate unit, and whether the 8(a)(5) allegation was timely under Section 10(b) of the Act.

9. Whether a *Gissel* remedy (395 U.S. 575 (1969)), is appropriate.

10. Whether reinstatement of certain employees should be denied.

B. *Respondent's Operation*

Respondent owns plants capable of processing liquid petroleum gases and pipelines capable of transporting liquid petroleum products. For the conduct of its transporting business Respondent, together with its wholly owned affiliates, operates storage, marketing, and distribution equipment and facilities for natural gas liquids and refined products which it transports primarily throughout Texas and neighboring States, servicing concentrated delivery points for the dense refinery areas of Beaumont and Port Arthur, Texas, and Lake Charles, Louisiana.

[2] The findings of fact set forth herein are based on the testimony that I have credited on the basis of lack of contradiction, corroboration, consistency, inherent probability, and demeanor. In thus evaluating testimony I was ever mindful of the fact that Ashton Thomas, who was involved as an official of Respondent in many of the incidents involved in this case, is now deceased. I do believe, however, that the Board's criteria (*United Aircraft Corporation (Pratt & Whitney Division)*, 192 NLRB 382 (1971); *Linde Air Products Co.*, 86 NLRB 1333 (1949)) in such situations may properly be less stringently applied where, as here, the onset of his final illness took place after the General Counsel had presented his witnesses, and after Thomas admittedly was, for a period of time, in the courtroom ready to testify as soon as another of Respondent's witnesses had testified. Clearly by that time Respondent knew what his testimony would be. Yet there is no indication that any efforts were made to preserve his testimony. Fortunately most of the events in which he was involved occurred in the presence of witnesses. Testimony which I have not credited has not been set forth in detail, nor have I deemed it necessary to explicate each variation or specific inconsistency appearing in the testimony. I have, however, carefully considered the testimony of all witnesses, including those whose testimony I neither accept nor refer to. To the extent that I have credited any witness only in part, reliance is placed upon acceptance of the fact that human perception of situations and events is subjective and/or colored by suggestion imposed upon a predisposition and, making allowance for this, it is not uncommon to believe some but not all of a witness' testimony. In evaluating credibility, I have relied on demeanor, not only while on the stand, but also while under my observation in the courtroom. I have also considered the employment status of witnesses at the time of the testimony. See *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978).

Among others it has terminals at Eunice, Port Allen, and Arcadia, Louisiana, and at Petal, Mississippi. At two of these terminals, Arcadia and Petal, Respondent has underground storage wells. These wells are located in natural salt domes into which the petroleum gas product is injected. Respondent stores gases which it owns as well as those owned by customers. Some types of petroleum gases can be mixed while others cannot be mixed. However, the same well can be utilized to store products owned by a customer along with that owned by Respondent.

A well's capacity varies with the natural formation and the so-called capacity assigned each well is a geological estimate. Additionally, a well may develop a pocket or fault through which the injected gas may escape and may become irretrievable. Nevertheless, sales and records are based on meter recordings of injections and similar readings on withdrawals into gas tank transport containers. In transporting petroleum gases, both that owned by Respondent and that owned by customers, Respondent utilizes, in addition to tank trucks, railroad tank cars, ocean tankers, and pipelines.

One of Respondent's customers has a refinery located at Purvis, Mississippi. This facility is a very large refinery known as the "Amerada-Hess" plant. Respondent operated a truck terminal at Purvis, Mississippi, from which it serviced this customer's plant. At that time Respondent was seeking property for storage which it located nearby Petal, Mississippi. Respondent also sought and constructed appropriate service facilities. The Petal facility, with a present total of nine salt dome wells utilized for the storage of propane and commercial butane products, and a truck terminal with tank docks and tank car racks and pumps, as well as a railroad siding, was opened in mid-1972. The Petal, Mississippi, terminal began servicing the Amerada-Hess facility from Petal, Mississippi, in October or November 1972.

Truckdrivers attached to the Petal terminal are dispatched to deliver and/or pick up for redelivery, propane, iso-butane, and normal and commercial butane, all of which products are flammable and explosive, requiring strict adherence to safety considerations. The area served by the Petal terminal includes locations in Mississippi, Louisiana, Alabama, and Texas. At the time of the events herein there were a total of 47 employees, 29 of whom were transport tank-truck drivers.

Homer Farrell was the Petal terminal manager. Fred Page was his assistant. The dispatcher was Doug Johnson, who had assistants, Mike Pickering and T. J. Smith. The repair shop located on the premises was under the supervision of Shop Foreman Jim Parker. The terminal operations were also scrutinized by company headquarters in Houston, not only by telephone and written reports, but also by visiting officials with authority over various aspects of the operation.

C. *Safety Concerns*

As part of a report at the end of each trip a driver fills out what is called a "work order" in which he notes any equipment defects observed. Additionally, as a matter of practice, the drivers verbally registered specific complaints relating to the malfunctioning of their equipment to a mechanic or to Shop Foreman Parker. They were also vocal regarding those complaints to fellow drivers as well as to the dispatcher, to Terminal Manager Farrell, and at safety meetings conducted roughly quarterly. Apparently complaints of inadequate maintenance of equipment had persisted for several years.

Department of Transportation regulations require operable speedometers and tachometers. Alvin Setliff, the mechanic for 8 years, recalled receiving complaints from drivers about inoperable speedometers and tachometers as well as the need for brake adjustments, missing shocks, which is considered an unsafe condition, and of defective door latches which he testified could cause an accident.[3]

On June 28, Terminal Manager Farrell conducted a safety meeting in a public restaurant at which the speaker was the company safety director from the Houston, Texas, home office. Drivers were required to attend. In response to the specific complaints by the regular driver of truck 2629, who asked whether he could get the shocks, speedometer, tachometer, and spring shackles of his truck repaired, Farrell told him he did not need to have a shock on the truck; he could take the other one off.[4] After hearing other drivers complain about the conditions of their trucks, Farrell announced that the trucks would be upgraded but that it would take some time to do so.

D. *The Concerted and Union Activity*

Drivers' complaints about the condition of their equipment which had become quite numerous began to congeal when, on June 26, James J. Thomas, following the incident of June 25, set forth, *infra*, and driver James Rouse were discussing the conditions of Respondent's equipment. They decided that the drivers needed help in getting their equipment upgraded and that the best approach would be to organize. Thomas contacted George E. Lee, senior business agent of the Charging Party. Three of Respondent's drivers, Thomas, Lowell Mayfield, and Paul Blackburn met with Lee at the union hall on the evening of June 27, where they informed Lee of their immediate concerns about unsafe equipment, other working conditions, and a lack of time off, and completed and signed applications for membership and authori-

[3] Testimony detailing specific complaints registered during the month of June and prior to the safety meeting include those of driver James J. Thomas, relating to a missing shock, inoperable speedometer and tachometer, and a defective door latch on truck 2629, all involved in an incident occurring on June 25, and detailed later herein; driver William Bounds' complaints about defective breaks and speedometer and tachometer; driver Daniel Carter's complaints about a worn spring shackle, a condition which he had entered on his trip report work order on each trip for over 6 weeks without effective response despite the fact that he spoke to Shop Foreman Parker, within a week of the safety meeting; driver H. Dale Purvis who had to make verbal complaints to the shop foreman several times concerning defective breaks on his truck; driver Boyd Davis who registered a complaint concerning malfunction of the "fifth wheel" and "bad jaws" made to both Shop Foreman Parker and Terminal Manager Farrell in June and who also encountered problems with the door on truck 2629; driver Billy Rose who on June 17 told Terminal Manager Farrell that truck 2604 was unsafe.

[4] Farrell recalled jokingly stating they would just take the other shock off the truck and not have to worry about that item, then promising to make the repair requested. It was repaired the next day.

zation cards for the Union. The three drivers took a supply of blank cards with them for the purpose of soliciting signatures of fellow employees. Thomas solicited signatures of several drivers.

Later it was arranged to hold a meeting of Respondent's employees at the union hall the next evening, June 28, after the safety meeting. Thomas called four or five drivers and asked them to spread the word of the meeting to other employees, and participated in doing so in the parking lot after the safety meeting was over. While Thomas and other drivers were thus engaged in inviting other employees to the union hall, Terminal Manager Farrell was present near the doorway to the restaurant looking in their direction. Thomas fixed the distance between Farrell and the employees' activity as varying from 5 to 35 feet away. In speaking with other employees about the union meeting, Thomas testified that he used his normal speaking voice. Farrell admitted that he was in the area of the restaurant door after the meeting as employees were leaving. He estimated that this was for about 5 minutes' duration, 3 of which were occupied in helping load the projector and other equipment into the safety director's car. Farrell also admitted that he saw two or three groups of employees standing around their cars talking before leaving the parking lot. However, Farrell fixes the distance as between 40 and 45 feet, and claims that he did not hear any discussion among the employees of going to a union meeting that night.

The General Counsel urges this conduct as unlawful surveillance. Although admittedly two-fifths of the time Farrell spent standing by the door was attributed solely to observing various groups of employees, I am reluctant to find that it constituted unlawful surveillance. It would seem, in the circumstances, that a certain purpose or volition is missing. There is no indication that Farrell had any prior inkling of employee Section 7 activity. He was outside the door of the restaurant tending to normal business. That in the process he fortuitously observed employees congregating in groups before they drove away and delayed a couple of minutes falls short, I believe, of unlawful surveillance. However, this does not foreclose any implication that in those few minutes he gained knowledge of the budding union activity of his employees.

On June 28 20 drivers attended the union meeting. Thomas continued soliciting signatures on authorization cards from that date through July 1, obtaining three signatures on June 29 and two on July 1.

E. *Early 8(a)(1) Conduct*

Between 4 and 5 p.m. on June 30, Alvin Setliff, a mechanic, was showing Farrell a broken truck seat. Setliff told Farrell he was in a quandary whether or not to sign a union card. Farrell stated he could not tell Setliff what to do, then added that "a lot of these boys I had confidence in have let me down. I've been working hard trying to get days off and better working conditions." Farrell placed this conversation as occurring after Thomas' discharge and denied the latter comment. I credit Setliff.

Farrell's statement carried a clear implication that he was aware of who among the employees had already signed union authorization cards. His statement not only tends to interfere with Section 7 rights of employees in violation of Section 8(a)(1) of the Act, but also stands as evidence of Respondent's particular knowledge of the identity of those who supported the Union at that time.[5]

Sometime between the June 28 safety meeting and the foregoing conversation, driver Steve Diem was called into the office by Farrell and interrogated as to any knowledge he might have of employees passing out union cards. Although Diem denied any knowledge of such activity, Farrell proceeded to inform Diem that he had heard about the union organizing and this would bring about the same thing that happened in 1972 at which time Diem "had been a victim of circumstances." Farrell said he did not want Diem to become a victim again and instructed Diem to "go out and tell the drivers what happened" in 1972; that Enterprise would not go union and would move the trucks out before it did.[6] Farrell admitted knowing about the union activity before talking to Diem but fixed the time of the conversation as after Jerry Thomas' discharge. He generally denied the content of the conversation as related by Diem. I do not credit Farrell's denial and find that Respondent thereby violated Section 8(a)(1), not only by interrogating an employee and threatening to close the terminal rather than accept a union but also by directing a senior employee to carry that threat to other employees.

When driver Dan Bichman returned to the terminal on July 1, he found a note in his box stating that Ashton Thomas wanted to speak with him. The following morning, July 2, between 8 and 8:30 a.m., Bickham met with Ashton Thomas in Farrell's office. Ashton Thomas told Bickham the Company had been good to him, and asked why he had not come forward and told any company official about the union activity. Bickham responded that he lacked information as to who started the Union and who or how many employees were involved. The interview is clearly unlawful interrogation violative of Section 8(a)(1) of the Act. Such interrogation along with the implication that continuation of "being good to an employee" is conditioned upon his becoming an informer

[5] See *Pilgrim Foods, Inc.*, 234 NLRB 136 (1978).

[6] With respect to events in 1972, Diem recalled that he worked for Farrell at Respondent's terminal at Purvis, Mississippi, when a union agent began an organizing drive. At that time Farrell called him into the office and told him the Company would not go union and would find a way to break it up. Farrell requested Diem to sign a union card and report to Farrell on the union activities of other employees. Diem accommodated Farrell as requested. During that union drive a company official held a meeting in which drivers were informed that Respondent would move the trucks out before it would have a union. Thereafter, the terminal was closed; the trucks were moved to other terminals; and the drivers were disbursed by transfer to various other existing terminals, on the Company's representation of a lack of need for the Purvis terminal because of the status of the Amerada-Hess contract. Diem was sent to the Houston, Texas, facility. It appears that the Purvis truck terminal was established in February 1972 on property of Broom Construction Company. Construction of the Petal storage facility had been underway since 1971 and began pumping in June 1972. The Purvis terminal was closed in September 1972 and Farrell became the Petal terminal manager. When Diem returned to the area in mid-1973, Respondent's trucks were still servicing the Amerada-Hess facility. Unfair labor practice charges and a petition related to the Purvis terminal were withdrawn in late August 1972.

also constitutes an implied threat violative of Section 8(a)(1) of the Act.

Shortly after the interview with Bickham, Ashton Thomas summoned driver Dennis Thornhill into Farrell's office. Ashton Thomas told Thornhill that Farrell had informed him of Thornhill's indication that he was thinking of leaving the Company's employ. Thornhill replied he had decided to remain. Ashton Thomas asked Thornhill for his reason for considering resignation and was told of dissatisfaction with the safety of the equipment in light of the dangerous product handled, the problems drivers had with the mechanic shop, and the fact that drivers were bound to company duty 24 hours a day, 7 days a week. Ashton Thomas addressed himself to the safety problem. He acknowledged the need for a larger and more efficient repair shop. He related what steps had been attempted to establish a larger repair shop and of the Company's efforts to hire more mechanics. He then informed Thornhill that "this stuff that has come up—all it's going to do is make the company mad and they ain't going to do a damn thing." Then Ashton Thomas said, "I'm not allowed to ask any questions, but I'll be willing to listen to anything you have to tell me." When Thornhill made no response, Ashton Thomas said, "This could turn out like it did a few years ago in Purvis, Mississippi."

Although making inquiries about employees' dissatisfactions is not unlawful, standing alone, when it is done in the context of a union organizing campaign of which the Employer has knowledge and is accompanied by assurances that methods of rectification of the problems are under consideration or active study, it becomes unlawful interference by solicitation of grievances and conveying an implied promise to better working conditions in order to remove any reason for union representation. The same is true where information concerning plans to improve working conditions is accompanied by a threat to drop such plans if the employees persist in their union activity. This interview, following on the heels of direct interrogation of another employee concerning the union activity of employees, leaves no doubt of Respondent's knowledge of employee union activity going at that time. In the context in which it occurred, I find that the word "this" as used in the phrase, "this stuff that has come up" and in "this could turn out like it did a few years ago in Purvis,"[7] had reference to employee union activity. Accordingly, I find in this interview of Thornhill by Ashton Thomas an unlawful solicitation of grievances, promise of benefit, an unlawful threat to withhold such benefit, and a threat to close the terminal, all depending upon the employees' response to union organization, and each of which are violative of Section 8(a)(1) of the Act.

F. *Employer Knowledge*

It is unnecessary to determine at precisely what moment responsible officials of Respondent came upon the knowledge that employees were engaging in concerted activity and that such activity included union activity. Admittedly, Farrell had obtained such knowledge before he unlawfully interrogated employee Diem, threatened that Respondent would close the terminal before it would accept a union, and propositioned Diem to go out and convey this warning to other drivers. Such attempts at unlawful interference with employees' Section 7 rights was repeated as late as 5 p.m. on June 30, and picked up by Ashton Thomas upon his arrival at the terminal on July 1[8] as evidenced by his leaving a note on that date for driver Bickham to see him, which note initiated Ashton Thomas' unlawful interrogation of Bickham. Thus, whether or not Farrell learned of the employee union activity from observing employees in the parking lot on the evening of June 28, after the safety meeting, it is clear that he gained that information shortly thereafter and proceeded immediately upon a course of unlawful interference, restraint, and coercion.

G. *The Discharge of James J. Thomas*

James J. Thomas, otherwise known as Jerry, was a driver attached to the Petal terminal from October 9, 1973, until his discharge on July 2, 1977. Thomas was regarded as a good driver and during his entire period of employment with Respondent Thomas was never the recipient of any disciplinary action. On the contrary, with the exception of one calendar quarter during his employment, he regularly received a bonus for accident-free driving performance from Respondent. Additionally, the National Truckers Association awarded Thomas 1-, 2-, and 3-year pins in honor of his safety record. Thomas encountered health problems in November 1976 involving a kidney stone operation and a subsequent heart attack. Consequently between that date and the end of April 1977, Thomas worked only a few days.

The truck regularly assigned to Thomas was truck 2652. At 4 a.m. on June 25, Thomas was dispatched to Toca, Louisiana, and returned to the Petal terminal at or about 11:30 a.m. After lunch Thomas was dispatched to Chalmette, Louisiana, but was only about 7 miles from the Petal terminal when the truck developed a very bad vibration. Thomas reported the problem to dispatcher Johnson and attempted to bring the truck back to the terminal, but the truck's universal joint fell out. Shop Foreman Jim Parker and mechanics Heider and Bounds arrived at the location to work on the truck. Thomas stood by the highway while the mechanics performed the emergency repairs and, at the direction of the shop foreman, then brought the truck back to the terminal shop, arriving at or about 3:15 p.m.

Upon his arrival and report that the shop could not repair his truck until the following day Thomas was directed by dispatcher Johnson to use another truck to complete the Chalmette dispatch. Having been on duty for nearly 12 hours and much of this time under stress, Thomas informed Johnson that he really did not feel like completing the dispatch as he had a headache from standing in the heat outside the road and was tired, dirty,

[7] The fact that Thornhill was not at that time aware of what had happened at Purvis does not remove the threat. Stated in the fashion that it was, Ashton Thomas could anticipate that Thornhill would take the trouble to find out what had happened.

[8] The hour of Ashton Thomas' arrival at the terminal is not fixed, nor is the precise time of the filing of the petition for representation filed by the Union on that date or notice thereof to Respondent fixed by the record.

and greasy. Johnson stated that this was his last dispatch of the day and he would appreciate it if Thomas could go. Thomas agreed stating that since he had been off sick for quite a time he needed the money and would take the dispatch.

Thomas proceeded to make the pretrip inspection on truck 2629 which was assigned for completion of the dispatch and departed at or about 3:30 p.m. To leave the terminal it was necessary to cross the railroad tracks that service the terminal. As Thomas did so, the door on the passenger side of truck 2629 flew open. After clearing the tracks Thomas stopped the truck, walked around to the other side, and slammed the door closed. About a quarter of a mile further the truck hit a small pothole in the road and the door flew open again. Thomas stopped the truck and again shut the door, which procedure became necessary twice more in the next 3-1/2 miles. Several miles further from the terminal Thomas was forced to stop and get out of the truck to close the door again. At this time he noticed that the right front shock was missing from the truck.[9] Thomas had also noticed during these few miles that the tachometer and the speedometer on the truck instrument panel were not operating. Thomas concluded that the truck was unsafe to operate. He tied the door shut with a rag and returned to the terminal.

Upon arrival at the terminal Thomas informed mechanic Heider of the missing shock and told him of the problems encountered with the door and of the other defects in the truck. Heider informed Thomas that there were no shocks available to install on the truck. As Thomas walked toward the dispatch office he heard the truck door slam. In the dispatch office Thomas informed dispatcher Johnson of the defects encountered with truck 2629 and advised Johnson that the truck was unsafe to drive. Johnson accused Thomas of not wanting to take the dispatch, asserting that no one else had complained about that truck. At this point mechanic Heider entered the dispatch office and stated to Thomas that the truck was ready. Thomas informed Heider, "You can't fix a truck by just slamming a door," and reiterated to Johnson that the truck was unsafe. Thomas then placed the dispatch papers on the desk, saying he was going home and would "see Johnson tomorrow," then departed. Later that day according to Farrell[10] Johnson reported the incident to Farrell who told Johnson to tell the assistant dispatcher not to send Thomas out until Farrell had a talk with Thomas.

The next day, Sunday, June 26, at or about 10 a.m., Thomas called dispatcher Johnson to inquire whether his regularly assigned truck was ready. Johnson replied it was not but should be back at the terminal between 1 and 2 p.m. At 2 o'clock Thomas called again and, learning that his regular truck was ready, inquired what the destination of his next dispatch would be. Johnson informed Thomas that he had reported the incident of the previous day to Terminal Manager Farrell and that Thomas probably would be going "nowhere," that Farrell would give him a week off. Thomas told Johnson he would report the following morning to speak with Farrell.

It was after this conversation that Thomas spoke with driver James Russ about the condition of Respondent's equipment that they were required to use, which culminated in a decision by employees to contact the Union. It was Thomas who contacted George Lee, the business agent for the Union, and then contacted fellow employees to accompany him at an appointment with Lee on June 27, to discuss their situation and an organizing plan. After the employees had spoken to the union representative on June 27, Thomas proceeded to the terminal to speak with Farrell.

At the terminal on Monday morning, Thomas related to Farrell and Fred Page, assistant terminal manager (who did not testify), the events of June 25 and the problems he had encountered. Farrell stated that he thought Thomas had quit, because in the trucking business when a driver refuses a dispatch it was an automatic quit. Thomas denied that he had quit but instead had expressed to Johnson his intent to return to work the following day and, therefore, had made it clear he was not quitting. Thomas restated to Farrell in more detail all the circumstances that had transpired on June 25. He emphasized that he did not refuse the dispatch, nor did he refuse to drive the truck but rather in accepting the dispatch and the substitute truck he had encountered unsafe conditions and had to return to the terminal. Farrell stated that he would consider the circumstances and inform Thomas later of his decision. Farrell did consider the circumstances, and decided to put Thomas back to work. The next day, June 28, Farrell so advised the dispatcher and phoned Thomas, instructing him to be present at the safety meeting to be conducted by the company safety director from the Houston headquarters at 7 p.m. that night and to be prepared to take a dispatch after the meeting. Thomas did attend the meeting and was thereafter dispatched. He was also dispatched on June 29 and 30 and July 1.

Homer Farrell testified that when he reported the Jerry Thomas incident and his decision to put Thomas back on dispatch to Ashton Thomas, Respondent's assistant to the vice president of operations, on July 1, Ashton Thomas stated that Farrell had mishandled the situation and should not have put Jerry Thomas back to work. He asked where Jerry Thomas was at that time and was informed that Jerry Thomas was on a trip and would not return to the terminal until early the next day. Ashton Thomas told Farrell he was overruling Farrell's decision and would terminate Jerry Thomas.

While at home at approximately 2 p.m. on July 2, Jerry Thomas received a telephone call from the terminal in which Ashton Thomas informed Jerry Thomas that he was overruling Farrell's decision and that Jerry

[9] A driver with over 6 years' experience, Thomas testified that a missing shock on one side could cause the truck to lean more than normal on curves with the effect that the liquid in the tank would run up the side and, if the liquid ran up just a fraction too high, it would cause the tank and the truck to roll over. Thomas testified that he was not familiar with that truck, therefore, he would be unable to judge when he was near that danger point. Farrell testified that removing both shocks would not be dangerous but would merely make the ride much rougher.

[10] Johnson did not testify. Driver Dennis Thornhill substantially corroborated the foregoing exchange. Additional comments related by Thornhill admittedly were not within the hearing of Thomas.

Thomas was fired for "refusing to drive a truck," on Saturday, June 25. Jerry Thomas protested he had not refused a dispatch, and requested permission to come to the terminal and talk to Ashton Thomas about the incident. Ashton Thomas refused to meet with Jerry Thomas, declaring that the decision had been made "and it stood." Jerry Thomas reminded Ashton Thomas of his driving and employment record but Ashton Thomas responded that he was following "Company policy."

To support the assertion that Thomas' discharge comported with "Company policy," Respondent offered the employment termination records of 52 transport drivers, other than Thomas, covering the terminals of Respondent and two of its wholly owned subsidiaries over a period of 8 years. Specific notations made on these records are inadequate to determine the comparability of the circumstances to those of Thomas.[11] On only one, that of driver Ronald Clark, is there an indication that truck safety was involved. His was listed as a resignation. On the termination report it is stated that the driver "said truck was not safe to drive . . . [named individuals including designated supervisor] took truck out on road test. They all said truck was ok. Driver would not take the trip." No such road test was made pursuant to the safety protest of Thomas. Indeed, there is verification rather than contradiction on the record that the various defects complained of did exist and that before his discharge, after the safety meeting, the needed repairs were made at the request of the regular driver of truck 2629 voiced by him at that meeting. Additionally, the official record of Thomas' dismissal makes no mention of the truck or of the fact that part of the dispatch was completed by Thomas and that two attempts to complete the assignment were aborted—first by equipment breakdown, then by the return of assertedly unsafe equipment. Instead, Thomas' termination merely recites "Refused a trip." Thus, it is clear that the termination documents themselves are not an adequate reflection of the circumstances in each case from which one may discern support for a claimed "Company policy" of automatic termination with no rehire for refusal of a dispatch.[12]

To overcome this inadequacy, Homer Farrell detailed the circumstances of such terminations in which he personally was involved. According to his testimony, two were clear refusals of the dispatch because the driver involved would not drive the particular make of truck solely on personal preference even when given the alternative of discharge by Farrell. The other one was a refusal to accept dispatch to a particular city merely because the driver stated he did not want to go to that city and continued to refuse in the face of Farrell's stated alternative of discharge. Testimony by other drivers cited incidents during this period of time when they personally had refused to drive a truck that was unsafe or had informed Farrell that they would not drive a particular truck again until certain repairs were made to brakes or windshield wipers, etc., because of safety. Those drivers include Tommy Holden, Billy Rose, and Mayfield.

On the basis of the evidence presented, I conclude that Respondent did not have an established company policy of discharging any driver who refused a dispatch, but rather considered the reasons therefor and the circumstances in each incident. Further, it is clear that Jerry Thomas did not refuse a dispatch as such but rather refused to complete it with what he deemed to be mechanically unsafe equipment, the defects of which are not in dispute.

Undoubtedly, this was also Farrell's conclusion when he, with authority to act on behalf of Respondent in this regard, as he had done in the past, considered all the circumstances surrounding the June 25 incident involving Jerry Thomas and decided to put Thomas back on full duty.[13]

There were no new developments or any undisclosed considerations related to the incident that came to light after Farrell's decision other than confirmation, verification, and rectification of the mechanical defects Thomas had complained of. In light of the holding that Farrell had not acted in contradiction to any "established Company policy" covering similar incidents warranting reversal, as claimed, we are faced with the challenge of discerning whether the real reason was grounded in an unlawful motive.

The General Counsel points out that, although the circumstances relating to Jerry Thomas' refusal to drive truck 2629 had not changed, "the context in which the ultimate discharge was effected had changed by the emergence of the Union." He urges that it was the advent of the Union which motivated Respondent to reconsider Farrell's disposition of the Jerry Thomas incident.

Admittedly Farrell gained knowledge of union activity by employees between the evening of June 28, after he had directed Jerry Thomas' dispatch, and before the afternoon of June 30. Also, admittedly, Farrell discussed the June 25 incident involving Jerry Thomas with Ashton Thomas when the latter arrived at the terminal on July 1. Thus, before Jerry Thomas' discharge on July 2, Respondent was fully aware of the union activity of its employees. In view of other factors present, I deem it unnecessary to have specific proof of direct knowledge by Respondent's officials of Jerry Thomas' role in seeking union representation. Rather, such knowledge may be inferred from the following:

[11] These records show that 17 were recorded as resignations; 10 reflect that the driver did not show up at work or call; 5 indicate that he would not haul the particular product; in 8 he would not drive the particular make of truck or would not drive a truck other than the one regularly assigned to him; 5 drivers refused to take local hauls at the lesser pay rate; and 1 driver returned from temporary duty at another terminal without permission.

[12] Additionally it is noted that while many of the termination papers submitted recommend against rehire, a large number fail to make any recommendation in this respect; one inserted "possibly," one stated "yes," and one stated, "I might reconsider hiring him after a few months, if I need a driver real bad"—this for a driver who refused to drive a particular make truck which he claimed was a rough ride. All were approved by an official of the home office of Respondent. Thus, any implication of a strict company policy against rehire is negated.

[13] It is noted that Farrell testified he is in daily contact with officials of Respondent in the Houston headquarters regarding the operation of the terminal and any problems that arise. Surely, if this incident and decision were significant enough to report to Ashton Thomas when he arrived at the terminal on July 1, and to warrant official reversal, it can be presumed that Farrell discussed it with someone of authority in the Houston headquarters before ordering Thomas' dispatch on June 28.

Up to the time of the events herein, Jerry Thomas had an unblemished employment record. That Jerry Thomas was the prime mover in contacting the Union and an active solicitor for signed union authorization cards both before and after the safety meeting, and before his discharge, is clear. He was also conspicuously one of the employees active in the parking lot after the safety meeting, in full view and hearing distance of Farrell, recruiting fellow employees to go to the union hall for a meeting. Farrell indicated in his statement to Setliff on June 30 that he was aware of who among the boys had signed union cards. Jerry Thomas was one of the very first to do so. The fact that the incident for which Jerry Thomas was assertedly discharged was the very incident which gave initial impetus to the concerted activity which grew into union activity does not deprive Jerry Thomas of the Act's protection in engaging in such activity. On the contrary, where the incident designated as the cause for discharge had been considered and excused before Respondent gained knowledge of union activity, there arises a need for a strong intervening consideration to explain the reversal of that decision. The only intervening factor is the union activity led by Thomas.

The Petal terminal, at the time of the events herein, employed a total of 47 employees, 29 of whom were transport drivers. The promptness with which Farrell became aware of the union activity after it started is indicative of the underlying validity of the small plant doctrine.[14] The precipitousness with which Farrell's decision to excuse the Jerry Thomas incident was reversed by a visiting official (within a week after the union activity began) gives rise to a strong inference that Respondent had knowledge of Thomas' leading role in union organizing and he was in fact discharged for that reason.

Having found that there was no fixed company policy which required automatic discharge for the safety position which Jerry Thomas took on June 25, and observing that no new factor arose relating to the incident which would cause reconsideration of the official disposition initially taken with respect to that incident and which might warrant an unprecedented reversal of the earlier disposition, other than knowledge of the beginning of union activity, I conclude, in light of that general knowledge of union activity, the nature[15] of the discharge, and the applicability of the small plant doctrine, that Respondent had specific knowledge or information concerning Jerry Thomas' leading role in bringing in the Union.[16]

Accordingly, I find that the reason given for the discharge of Jerry Thomas was pretextual, and that his discharge was unlawful in violation of Section 8(a)(3) and (1) of the Act.[17]

H. *Continued 8(a)(1) Conduct*

On the afternoon of July 3, when Bickham was returning from the terminal to his residence, he was followed by Ashton Thomas, who parked beside him. Thomas asked Bickham whether he knew anything else about the Union. On Bickham's reply that he did not, Thomas drove away. The fact that Thomas followed Bickham home from work to pose this question clearly removes it from the casual category of conduct. I find this conduct to be coercive and therefore unlawful interrogation violative of Section 8(a)(1) of the Act.

Two days later, in Farrell's office and presence, Ashton Thomas asked Diem what the drivers were saying about Jerry Thomas' discharge. Diem stated he did not know, then added that he had been approached to sign a union card. Farrell asked Diem, "Who by?" but Diem declined to disclose the name of the employee. Instead he asked Farrell what he should do about the card. Farrell told him not to sign; that the Company would know who signed cards and who would be against those who did, adding the assertion that the Company would not go Union—"they are going to move the trucks out." Farrell then attempted again to learn the identity of the employee who had presented Diem with an authorization card, naming four employees, three of whom were those who initially contacted the Union.

In view of the finding that Jerry Thomas' discharge was because of his union activity, I find that interrogation of an employee concerning the reaction of other employees to this discharge constitutes unlawful interrogation in violation of Section 8(a)(1). Since Diem volunteered the information that he had been requested to sign a union authorization card, this interrogation might be excusable but for the fact that Farrell persisted in the face of Diem's reluctance in attempting to ascertain the identity of the solicitor. In the circumstances I find unlawful interrogation. Further, I find an impression of surveillance in his statement that the Company would know who signed cards verified by his naming the first three individuals to sign such cards, and a threat of retaliation by closing the terminal in his assertion that the Company would move the trucks out. Each of these is unlawful under Section 8(a)(1) of the Act.

On July 12, Diem was at the fuel pump on the yard engaged in a discussion with the assistant dispatcher when Ashton Thomas approached and asked Diem if he knew where the union meeting was being held. Diem indicated he did not. Employees Terry Brumbaugh, a tire and service worker, and Setliff, a mechanic, joined the group and Thomas asked the same question of Setliff who gave the same reply. Thomas commented, "Well it

[14] See, e.g., *The Huntington Hospital, Inc.*, 229 NLRB 253, 256, fn. 14 (1977).

[15] I deem it significant that Ashton Thomas would not consider any explanation by Jerry Thomas or even consent to see him personally.

[16] Respondent does not dispute the authority of the Board to take judicial notice of its own prior cases in appropriate circumstances. However, Respondent opposed the General Counsel's motion to apply judicial notice with respect to two prior proceedings on two grounds: (1) that the elapse of 7 and 8 years, respectively, made those cases too remote in time; and (2) that the principals here involved had no authority to make policy in those cases, one of which involved an unrelated corporation with whom said principals were then employed. In support of its remoteness argument, Respondent relies on *Imperial Bedding Company*, 224 NLRB 1560 (1976). As I find it unnecessary to look for motive in background conduct, I find it unnecessary to dispose of Respondent's argument.

[17] Having found that Jerry Thomas' discharge violated Sec. 8(a)(3) and (1), it becomes unnecessary to consider the General Counsel's alternative position that his discharge was for the concerted activity of protesting unsafe conditions, a common concern of all drivers, and therefore protected by Sec. 8(a)(1) of the Act.

looks like you are another man on my side." At that point Thornhill walked across the yard. Thomas commented if he "could prove Dennis Thornhill was pushing the Union or had something to do with it he would fire the s.o.b."[18]

Here again Ashton Thomas followed his pattern of unlawful interrogation violative of Section 8(a)(1), this time accompanied by comments constituting unlawful impression of surveillance and unlawful threats of retaliation by discharge violative of Section 8(a)(1) of the Act.

On August 21, driver William Bounds reported to the office for a discussion related to his comments made to the operator who had telephoned his notification of dispatch. Both Farrell and Ashton Thomas were present. Bounds was told he had exactly 2 hours in which to report after notification of a dispatch. The discussion became heated and, according to Farrell, Bounds stated that the employees were trying to obtain union representation which he favored.[19] This was not news to Respondent's officials, for the election on the Union's July 1 petition was scheduled to take place on August 26. Nevertheless, this triggered a discussion in which Ashton Thomas became angry and declared that "starting all this shit wasn't going to help . . . they were going to find out the ones that caused it and straighten it all out." Farrell admitted that Thomas may have expressed his feelings about the Union.

Consistent with his pattern, Ashton Thomas' statements reach far beyond what is permitted under the Act. I find in these comments not only an unlawful impression of surveillance and an unlawful threat of retaliation violative of Section 8(a)(1), but also a threat not to bargain in good faith if the Union should be the employees' choice which also violates Section 8(a)(1) of the Act.

I. *The Rule*

A memorandum dated February 10, 1977, from Vice President J. L. "Buddy" Davis states:

> There will be no information given to anyone either verbally or written in regard to company business such as revenue, inventory, products and so forth, except by instruction of Dan L. Duncan and Terry McMahon. There will be no exceptions to the above.

Farrell received this memorandum on February 14, 1977, wrote that date and the word "notice" on it, made copies, and then posted one on the wall by the timeclock and one by the dispatch window in the terminal office building, one in the operators' lab building and one in the operators' storage building.[20] Farrell testified that such posting was continuous from the indicated date.

The General Counsel contends that this constitutes an overly broad no-solicitation/no-distribution rule which is, in effect, a "gag" rule that prohibits employees from discussing and/or disseminating, in *any* manner under any circumstances, *any* information related to Respondent's operations and that such restrictions impinge upon employees' Section 7 rights to engage in union and/or protected activity. Thus, by its terms, the rule explicitly prohibits dissemination of all information related to Respondent, including matters relating to employees' working conditions,[21] without any limitation as to time or geographical reach; i.e., the rule does not purport to limit its applicability to worktime or work areas and, therefore, must be construed as applying to nonworktime and in nonwork areas. For these reasons the rule is at least presumptively unlawful.[22] The use of the phrase "and so forth" clearly conveys an unlimited number of subjects and reach of the rule, which is ambiguous, and must be construed as having application to all subjects related to employee working conditions including rates of pay, hours of work, terms and conditions of employment, availability of work in prospect or diversion thereof, and any other term and condition of employment. We are reminded that the "risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it."[23] And since the only stated exception to the rule is "by instruction" from the company president and its house counsel, it is clear that a prerequisite to divulging any information covered by the rule is the employer's permission. Any rule that requires employees to secure permission from their employer as a precondition to engaging in protect-

[18] Variations in the versions of these comments merely serve to underscore the fact and nature of the conduct.

[19] Farrell also testified that Bounds threatened that he would beat up employees who were against the Union and that Farrell's "number was coming up." Bounds admitted stating that "every dog has its day" and "by God yours is coming," but denied the alleged threat. In physical appearance, Bounds is perhaps smaller than what might be considered average and much smaller when compared to Farrell and to most of the employees who came to the hearing. Indeed, in this conversation Ashton Thomas referred to Bounds as "a smart alec little punk." It is much more likely that any threat uttered by Bounds was in the nature of united force through law under the union banner which would be the import of the admitted comment, rather than physical force. In any event, the comparative sizes would foreclose Farrell from experiencing any real threat of physical harm from Bounds and clearly he entertained no concern that any threat against other employees would be carried out as there is no suggestion that any comment or steps to prevent such action were made then or later. That Bounds may have a vivid temper, as suggested in testimony relating events at a subsequent unemployment hearing, does not alter my conclusion here nor does it excuse the unlawful nature of Respondent's conduct.

[20] Testimony indicates that President Duncan directed that this memorandum be written and distributed to all terminals because of an incident in which rumors were purportedly passed to some of Respondent's large customers that Respondent had been selling the customer-owned and stored propane on the market during a shortage of that product.

[21] The General Counsel graphically suggests statutory areas wherein the uninhibited reach of the rule would intrude as prohibiting employees from discussing their wages and hours, or complaints about their employer-imposed working conditions or the safety status of their equipment; restricting employee communication to a selected union representative concerning matters vital to the campaign or a union's ability to assist such employees; in processing grievances or in bargaining on their behalf or in protecting work availability; in the context of allegations of labor law violations it would preclude any assistance to the Union, the Board, or to one another in seeking redress of wrongs in violation of statutory proscriptions.

[22] Reliance is placed upon precedent including citation of the following cases: *Paceco, a Division of Fruehauf Corporation*, 237 NLRB 399, 400–401 (1978); *East Bay Newspapers, Inc., d/b/a Contra Costa Times*, 225 NLRB 1148 (1976); *Eastex, Inc.* v. *N.L.R.B.*, 437 U.S. 556, 570–576 (1978).

[23] *McGraw-Edison Company*, 216 NLRB 460 (1975).

ed concerted activity on an employee's free time and in nonwork areas is unlawful.[24]

The circumstances giving rise to the establishment of the rule, involving as they did unusually inclement weather, a nationwide fuel shortage, and maintenance of the property rights of major storage customers, were in no way related to the situation during the period involved herein. Respondent has presented no special circumstance which might justify the continued maintenance of such an overly broad restriction upon the freedom of communication of its employees with one another and with their prospective representative or with this Board. In the circumstances, the General Counsel urges that, in the absence of proof of a competing property right of Respondent, the rule is *per se* unlawful rather than merely presumptively unlawful.[25]

Respondent argues that:

> . . . there can be no conceivable way that employees could interpret this rule to prohibit lawful solicitation and distribution as it relates to union or protected concerted activities. Moreover, there is no evidence that it was ever interpreted to prohibit such . . . Further, there is no contention that the rule and/or policy was designed for unlawful purposes . . . The fact that the rule was published well in advance of any alleged union activity dictates a finding that there was no unlawful motivation that precipitated it . . . . Also, the memorandum was sent to all terminals, not just the Petal terminal, and at a time prior to the advent of the Union. Lastly . . . [in view of testimony that some witnesses] were unaware of the rule, it is difficult to understand how employees may be restricted and discouraged "from engaging in union and/or protected concerted activity by a rule they are not even aware of."

Respondent's argument has the air of being facetious in light of events detailed *infra* wherein violations of the rule were the supplied basis for discharge of those employees suspected of giving information through a discharged employee and the Union to the NLRB in furtherance of this unfair labor practice proceeding.[26]

For the reasons advanced by the General Counsel, I conclude that the cited rule, although not posed in the standard no-solicitation/no-distribution verbage, constitutes an unlawful restriction of employees' Section 7 rights, and that the admitted maintenance of this rule during the relevant period is a violation of Section 8(a)(1) of the Act.

J. *Section 8(a)(1), (3), and (4) Discharges*

On August 30, 1978, while the hearing herein was in progress, Respondent discharged employees James T. Rouse, Lowell Mayfield, and Dennis Thornhill for violating the above-considered rule by allegedly providing Jerry Thomas, after his discharge and the layoffs hereinafter discussed were the subject of unfair labor practices, with information revealing the movement of products to and from Respondent by tank car, which information Respondent asserted was taken from its teletype machine located in the dispatcher's office.

On August 22, Rouse had appeared as a witness for the General Counsel and, on August 24, Jerry Thomas testified. In his testimony the latter identified Lowell Mayfield as one of the employees who initially accompanied him to the conference with Union Representative Lee. In the course of Thomas' testimony, it was revealed that a list recording such rail tank car movements of material was attached to the affidavit which Thomas had given to the Board agent in preparation for this case.

After their discharge, Rouse, Mayfield, and Thornhill testified that they did not divulge or turn over any information from the teletype to Thomas, whereupon, on September 13, they were returned to their jobs but were discharged again on October 4, 1978, pursuant to the aforementioned date, this time purportedly because the three employees provided Thomas with information allegedly obtained from company records of rail car movements compiled from the teletype and other sources by the office employee, maintained by her and kept on open display. Each of the affected employees again denied providing such information to Thomas from any source.

The General Counsel contends that each of these discharges on August 30 and October 4, 1978, was violative of Section 8(a)(1), (3), and/or (4) of the Act.

I have found the rule, itself, unlawful. The Board has held that an unlawful rule can provide no justification for an employer who takes action affecting the tenure or terms of employment of those violating the rule; that the action taken itself becomes unlawful; and that the employee thus affected must be reinstated and made whole,[27] unless there are special circumstances which might otherwise justify the action.[28]

Respondent presented evidence of the circumstances which gave rise to the rule. However, that situation substantially differs from the present one. The information attached to Thomas' affidavit contained no trade or competitive secrets. No evidence was presented showing that Respondent's business was harmed or in danger of being disrupted in any way because of the dissemination of the information involved herein. Further, the record reveals that the information was not kept in a fashion indicating that it was confidential, nor were employees informed that it was restricted information. Indeed, it was kept in the open, readily accessible from two sources and available to drivers or anyone else entering the dispatch office which every driver frequented daily. Moreover, this was the type of information that, if sought, could be available from sources other than Respondent's records. It would appear that its only value, other than internal company operation, related to the possible diversion by Respondent of the work of employees whose layoffs are alleged

[24] *Peyton Packing Co.*, 49 NLRB 828 (1943); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962); *AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977).

[25] *American Cast Iron Pipe Company*, 234 NLRB 1126, 1129-34 (1978).

[26] See *Florida Power & Light Credit Union*, 238 NLRB 937 (1978), and cases cited therein.

[27] See *Grane Trucking Company*, 261 NLRB 362, (1982).

[28] See *The Singer Company*, 220 NLRB 1179, 1181 (1975), and cases cited therein.

herein to have been unlawfully motivated. Respondent's labeling of this disclosure of recorded tank car movements as a theft does not excuse its own unlawful conduct. Accordingly, I find that the discharges of Rouse, Mayfield, and Thornhill for asserted violations of the unlawful rule were unlawful discharges violative of Section 8(a)(1) of the Act.

The General Counsel also urges that the discharges were retaliation for union activity. As for motivation, it is clear that, in contrast to the treatment accorded Rouse, Mayfield, and Thornhill, the record establishes that no other employee has ever been discharged for violating the foregoing rule, although, admittedly, Senior Vice President Ray has on many occasions "chewed out" employees for revealing sales information and product prices to unauthorized persons outside the Company. Thus, the severity of the discipline meted out to Rouse, Mayfield, and Thornhill is unprecedented, indicating Respondent's union animus and unlawful motivation.

Further, it is clear that when Respondent discovered the disclosure of information in question during this proceeding it also learned that this information had been supplied in connection with this unfair labor practice case, first to the Union and thence to the Board. Respondent therefore knew that the information had been disclosed as a part of employee union and statutory activity. Additionally, Respondent knew that two of the three employees it chose to suspect of obtaining and disclosing the information had assisted Thomas in union organizing and that all either had or would testify as witnesses presented by the General Counsel in this case.[29]

Respondent's union animus is established by its conduct beginning with the onset of union activity. Respondent's unlawful motive is inferred from the disparity of treatment meted out for rule violations. Respondent's knowledge of the purpose for which the information was supplied constitutes knowledge that it was obtained in the course of concerted and union activity. Accordingly, I find that Respondent's discipline by discharge of the three employees accused of supplying Thomas with the information related to tank car rail movements and thereby breaking the unlawful rule constitutes a violation of Section 8(a)(3) and (1) of the Act.

Further, as Respondent knew that the information was obtained and disclosed for the purpose of prosecuting this case, and it knew that Rouse, Mayfield, and Thornhill had, or would, testify in these proceedings, its discharge of these three employees for their part in supplying information to the Board constitutes violations of Section 8(a)(4) and (1) of the Act.

Even if my determination that the foregoing rule was unlawful fails, Respondent unquestionably knew from the start that the disclosure which it asserts constituted misconduct occurred in the course of union activity. Yet Respondent has presented no persuasive evidence that it, in good faith, believed these three employees engaged in the breach of the rule, or indeed any evidence upon which it based a belief that they were involved other than that obtained in this proceeding; namely, their actual and/or anticipated participation in this Board proceeding and Thomas' contradicted testimony that it was his recollection these three plus two others he could not recall were his source for such information. On the other hand, a preponderance of the credited testimony indicates that the three dischargees did not in fact commit the suspected offense.[30] Accordingly, I find, without regard to the unlawful rule, that Respondent's discharges of Rouse, Mayfield, and Thornhill on August 30 and again on October 4, 1978, were unlawfully motivated for union activity and in retaliation for their assistance and participation in an unfair labor practice proceeding before the Board in violation of Section 8(a)(1), (3), and (4) of the Act.

K. *The Layoffs*

On July 18, Respondent laid off 12 of the remaining 28 transport drivers at its Petal terminal.[31] On August 8, it laid off four more drivers.[32] These layoffs, the General Counsel contends, were unlawfully motivated and therefore violative of Section 8(a)(3) and (1) of the Act. Respondent asserts that the layoffs were caused by economic considerations and therefore lawful.

Additionally, the General Counsel contends that initially the layoffs were temporary but that Respondent changed them to permanent layoffs when this was announced on August 23, during a speech made by Respondent's president to the terminal employees regarding the upcoming Board election scheduled for August 26. The General Counsel contends that the change was made for the purpose of preventing laid-off employees from voting in the election and as this change was unlawfully motivated it constitutes a violation of Section 8(a)(3) and (1) of the Act. Respondent asserts that the layoffs were permanent from the outset.

Further, the General Counsel contends that Respondent's failure and refusal to recall the senior driver in layoff status to take the place of one who had quit during this period was discriminatorily motivated and a violation, not only of Section 8(a)(3) in the failure to recall, but also an independent violation of Section 8(a)(1) by President Duncan's response to an inquiry by one of the senior drivers in layoff status about this vacancy, that there would be no recall of drivers "until this mess is over." These violations are also denied.

Vice president of operations, J. L. "Buddy" Davis, testified that in the latter part of the week ending July 8, either Ashton Thomas, his assistant, or the Petal terminal manager, Homer Farrell, informed him of the Union's letter (the representation petition had been filed by the Union with the Board on July 1, and a demand letter admittedly was received on or before July 4) and that when he learned of this he and Vice President of Distribution Tom McAdams discussed the Petal union activity.

[29] I need not determine whether Respondent's motive in discharging the suspects was designed to coerce them in their testimony and "to interfere with the General Counsel's presentation" of the case, as suggested in his brief, as this would not add a violation.

[30] *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21 (1964).

[31] Drivers laid off were Dan Bickham, Jack Blackburn, Paul Blackburn, Daniel Carter, Abner Davis, Charlie Daw, Maurice Dickens, Steve Diem, Tommy Holden, H. Dale Purvis, Billy Reid, and Ray Williams.

[32] The four were Boyd Davis, Joe Faggard, Joe Shows, and Howard Stevens.

On July 7 or the morning of July 8, McAdams came into his office and informed him that Bill Ray (William D. Ray, senior vice president of Respondent who was in charge of supply sales and transportation) had decided to cease trucking Exxon's Jay, Florida, commercial butane and that he was passing the information along to Davis who was responsible for transportation at the terminals. McAdams informed Davis that the commercial butane which had been trucked from Jay to Petal storage would now go by rail tank car to the Mont Belvieu, Texas,[33] facility of Respondent, and to Mobil Oil's Hull, Texas, facility for fractionation.[34] The two discussed the impact of this change on the Petal terminal and also the union activity at the Petal terminal. No conclusions with respect to the Petal terminal drivers were made in this conversation because such matters had to be discussed with President Duncan who had left Houston on July 1 on a trip.

When Duncan returned to Houston on July 8, he phoned the office and was informed by Davis of the employee organizational activities at the Petal terminal and that the Company had received a letter from the Union. Davis also informed Duncan of the discussion he had with McAdams concerning the delivery changes from Jay and the possible impact upon the availability of work at the Petal terminal. Duncan directed Davis immediately to call a meeting of all terminal managers for Monday, July 11, in Houston.

Farrell was in attendance at the July 11 managers' meeting. A general discussion of unions and a discussion of the situation at the Petal terminal took place, directed primarily to ascertaining whether that activity had spread to other terminals. Duncan, Davis, and McAdams were present at that meeting as well as Respondent's corporate counsel, Terry McMahon, and Respondent's attorney, I. J. Saccamanno. Managers were not only questioned about union activity at their respective terminals but were also briefed on what they could and could not do during a union campaign. A reply to the Union's demand for recognition as representative of the Petal terminal employees was sent by Respondent refusing recognition.

The managers' meeting was followed about an hour later by another meeting of Duncan with Davis and McAdams at which the availability of work for the Petal terminal was discussed.[35] The group was later joined by McMahon and Respondent's attorney and, after receiving legal guidance emphasizing that any layoffs should be on the basis of seniority, Duncan decided to lay off 12 drivers at the Petal terminal.[36] Davis recalled that he and McAdams had had little time to do much of a study of the business situation between the time they learned of the union activity at Petal and the time when Duncan returned from his trip. They informed Duncan that the sales department might have information regarding the need for product movement by the Petal terminal.

There is no indication that the sales department was ever contacted. Nor was Senior Vice President Ray consulted. Ray, who presented most of the financial records and testimony to support Respondent's economic defense, and who apparently is the one most conversant with Respondent's overall operation, testified that he was not at this meeting, nor had he supplied Duncan with any information on business conditions prior to the decision to lay off 12 drivers. Indeed, Duncan did not seek such economic information from Ray even in a conversation he had with Ray later that day,[37] in which Duncan mentioned to Ray the Petal terminal both as to the tank truck requirements there and as to the Petal terminal union activity, without indicating that they were unrelated. In that conversation Duncan stated he had requested information on the economics of all hauls made by the Petal terminal,[38] but Duncan did not, in that conversation, mention the layoff decision.

When Duncan decided to lay off 12 drivers at the Petal terminal he assertedly decided to have a study made to determine how many drivers were really needed at the Petal terminal to handle its regular business. Thus, purportedly, he asked Davis at the July 11 meeting to prepare a survey of the permanent business at Petal; to

[33] At Mont Belvieu, Texas, 35 miles east of Houston and about 30 miles from Hull, Texas, Respondent operates a propane propylene splitter, a truck loading and unloading facility, a tank car loading and unloading facility, a fractionation plant, some aboveground storage tanks, and a terminal building. There are also connections with several pipelines, including Texas Eastern Pipeline and Dixie Pipeline, but there is no pipeline from Jay, Florida, to the Houston area, a distance of some 400 miles. Cost factors aside, this is too long a round trip for a driver to make under Federal Motor Carrier Safety Regulations without an 8-hour stop, drivers being limited to 10 hours' continuous duty. The General Counsel does not contend that Petal drivers should have been assigned this work.

[34] Under arrangements by Respondent with Mobil Oil Company, the commercial butane, delivered to Mobile's facility at Hull, Texas, was moved by Mobil pipeline to its Beaumont, Texas, fractionator where the product was broken down into normal butane, isobutane, and propane. These products were then delivered back to Respondent via Respondent's pipeline located in that area or by Texas Eastern Pipeline, and distributed by Respondent to its customers. Propane from the fractionation is returned by pipelining or tank car to Petal for storage. A reason for performing the fractionation was profitability. After the winter season the price received for normal butane, which is approximately 40 percent of the mix in commercial butane, was substantially higher than that received for the commercial butane itself, and the fractionation supplied also the two other products for sale. Therefore, Respondent was fractionating all of the commercial butane it could, and was not only using its own facility to capacity for this purpose but also was seeking contract arrangements for such work with other oil companies in addition to Mobil.

[35] Duncan testified that Davis said Petal terminal drivers had nothing to do; that this situation had existed for 8 to 10 days, and that this was the extent of Davis' contribution. At another point Duncan testified the layoffs were based on the recommendations of Davis and McAdams. Then he testified the decision was based on anticipated future business prospects, something about which Davis would have no knowledge. Neither Duncan nor Davis showed any recollection of what McAdams mentioned other than the change in the Jay, Florida, Exxon commercial butane transporting and distribution which was now going to Respondent's Mont Belvieu, Texas, facility—a plan that was not news to Duncan—and that the Amerada- Hess plant at Purvis was "down" on a 3-week "turnaround." (A yearly event with no Petal layoffs occurring in the past as a result.) Admittedly, no company records were presented or studied.

McAdams did not testify. It appears that he resigned his position with Respondent early in 1978. There is, however, no indication that McAdams was unavailable. There is a presumption therefore that had he testified he would not have added support to Respondent's position.

[36] Contrary to Davis, Duncan indicated that the number of drivers to be laid off was the recommendation of Davis and McAdams.

[37] Ray advises Duncan on markets, supply, and transportation and the economics of the entire operation.

[38] There is no indication from whom he requested this information or that he ever received such a study.

ascertain the drivers' wages under normal conditions prior to the month of July; and to project whether the permanent business would support 16 drivers with an income comparable to that norm: The results of such a survey to be reported to Duncan later. However, Duncan testified that he did not review any business records either on July 11, or in the interim before effectuation of the layoffs on July 18. Duncan testified he merely instructed Davis to carry out the layoffs but did not instruct Davis as to any particulars.[39]

Davis was dispatched to Hattiesburg, Mississippi, to conduct a meeting for Petal terminal employees and to effectuate the layoffs. Ashton Thomas accompanied Davis and was present at the meeting. Also present was Terminal Manager Farrell who was not previously advised or consulted concerning the layoffs and who learned of them for the first time on July 18, a date falling in the middle of a pay period—this, despite the fact that he is in daily contact with officials in Houston.

At the meeting Davis informed drivers that there had been a decrease in the available work necessitating the layoff of 12 drivers. The only significant contradiction in what Davis claims to have told drivers and the testimony of others present at the meeting relates to the nature of the layoffs. Davis insisted he told drivers their layoff was permanent whereas they testified that he told them it was temporary. Farrell testified that the reasons for the layoffs were never discussed with him. However, he concluded that the layoffs were permanent because Davis told the drivers he could not tell them when they would be called back to work.

As to reasons for the layoff, admittedly Davis informed drivers that the commercial butane they had been moving from Jay and Escambia Creek, Alabama, to storage would no longer be moved to Petal, but was going to Houston or Mont Belvieu for fractionation; nor would the product be moved by truck but that the Company would use tank cars to move it by rail to Texas; that the commercial butane well at Petal was almost full; that there was not a sufficient market in the area to replace this work; and that it was possible they would not need as many trucks as they had to supply the winter market because many companies had ordered equipment to move and store their own products.

The testimony of the drivers and of Farrell indicates that Davis also mentioned the fact that Amerada-Hess at Purvis, Mississippi, was closed on a 3-week "turnaround" that Tenneco at Chalmette also had a unit down under similar circumstances and was on half-production; that Respondent had lost some contracts, including the Exxon "off-specification" gas contract at Jay because Exxon now had its own "cleaning facility";[40] that the Company was carrying the commercial butane from Jay to the Texas area by tank car; that the Company was losing customers; that certain named companies were buying storage tanks in preparation for the winter and were buying their own trucks and hauling their own product; that the storage wells at Petal were practically full; and they were having trouble disposing of brine water from the wells; and that Respondent was trying to switch over to rail and pipeline transportation from trucking as fast as possible because of the cost factor. Davis, in summary, told the drivers that as a result of these various business factors Respondent did not then have enough business to support the number of drivers employed at Petal and, therefore, was laying off the bottom 12 men on the basis of their seniority standing. Davis then read off the list of drivers being laid off by name and directed Farrell to call the dispatchers, who had no prior knowledge of the layoffs, to ascertain who was scheduled to go out on a trip after the meeting. Some of those on the laid-off list were scheduled for trips but were not permitted to take the assignment.

Davis invited questions from the drivers and, upon inquiry, informed the laid-off drivers they could file for unemployment benefits which they could collect until they found a job or were recalled. To questions as to the length of the layoff, Davis told drivers he did not know how long it would last, stating that it might be for 2 weeks or they might not be recalled until wintertime. Davis stated that this information would have to come from the Houston office, but Davis assured the drivers that if work picked up they would be called back in the order of their seniority and that they would be called back before anyone new was hired. In response to another inquiry, Davis told laid-off drivers they could receive their part of Respondent's profit-sharing plan but that this would take time and he would try to expedite it.[41] When asked about transfers to other Enterprise terminals, Davis advised that in other terminals they would retain Enterprise seniority and other benefits but not terminal seniority, adding that there was a companywide slack in work and he could not hold out much promise for such placement. Davis informed drivers that an affiliate, Cango Corporation of Texas City, Texas (referred to by Farrell as the common carrier end of the business), was hiring, and invited a show of hands of those who would be interested in his arranging an interview with a Mr. Tipton of that company for the following Wednesday. Most of the drivers indicated they were interested.

[39] Duncan testified that this was because "Davis was at the meeting" implying that Davis knew what the reasons were. The timing also apparently was left up to Davis. Later Duncan testified that Davis merely reported that the layoffs had been accomplished. Then in contradiction Duncan testified that Duncan was aware of the reasons Davis told him Davis had given employees for the layoff, and Duncan was also aware of what reasons he had told Davis to give. Finally Duncan testified he instructed Davis that the layoffs were permament with respect to both the July and the August layoffs, with no indication as to when he told Davis this. This is a small sample of the vacillation, contradiction, and vagueness found in Duncan's testimony generally. As a witness, I found him highly unreliable.

[40] Petal has a "scrubber," used to restore such product to specification. However, it appears that this change at Exxon took place in early 1976. Davis admitted he mentioned it as part of the total picture. Davis claims lack of recollection but does not deny that he also mentioned other factors listed by the other witnesses.

[41] A driver who did not recall this particular exchange nevertheless did receive his share of the profit-sharing plan about a month later. Another driver testified that no mention was made that there was a limitation on such withdrawals except when the employment status is terminated. Subsequently, employees did receive notice of a deletion of such a limitation from the plan, and of new provisions permitting employee participant withdrawals.

Farrell took the names of those who responded affirmatively.[42]

According to Duncan, the considerations which led to his decision to initiate the layoff of drivers at Petal were three—all primarily related to the changes in transporting the commercial butane from Jay, Florida. These included (1) cessation of the use of Petal trucks to move the product to Petal storage and the use of rail tank cars beginning in April to take the product to south Texas together with the Exxon decision on April 6 to discontinue receiving the redelivery of commercial butane at its Baton Rouge facility;[43] (2) the lack of demand for commercial butane in the south Louisiana area refineries generally, which began seasonally in March and April; and (3) the anticipated filling of the commercial butane well at Petal by mid-June.[44] Admittedly, Duncan knew of the Jay-Exxon diversion some 3 months before this layoff decision.[45]

Duncan indicated that Davis and McAdams had informed him of the lack of business at the Petal terminal which had existed for 8 to 10 days due to the Amerada-Hess "turnaround," but this was not a factor in his decision. Also excluded by Duncan as having any bearing in his consideration were the purchase by customers of their own trucks to transport their products; changes which had occurred in 1976 in the movement of Exxon "off-specification" propane; and the problem related to disposal of brine water from the Petal storage wells. Finally, Duncan denied that Respondent had lost any contracts at that time. All of these were among the reasons given to the drivers by Davis as the reasons for the layoff. Duncan admitted that he also gave no consideration to the fact that demand for commercial butane is seasonal with a high from September to March, slacking off from April through August, and that this had not previously occasioned any layoff of drivers at the Petal terminal.

With respect to the August 8 layoffs, it is claimed that there was a meeting on August 4 in which Duncan conferred with, and received "input" from, Senior Vice President Ray, Vice President for Supply and Distribution Ray Caskill,[46] Manager of Supply and Sales Bob Hawkins, McAdams, and Davis. Duncan testified that Davis had no "input" but merely asked what to do. Then he testified that McAdams and Davis informed him that the Petal terminal only required 10 drivers but he decided to release only 4 out of the 16 drivers. Contradicting himself Duncan assertedly assessed studies contributed by Davis,[47] and made his own "projections" using a formula of "10 hours X 6 days = 1 driver unit," divided into the estimated work available under what he knew to be the permanent contracts for work within the area, plus two drivers for sick leave and vacation fill-in. Duncan worked this out while returning to Houston by plane without any records and before he allegedly conferred with the named individuals.

Hawkins did not remember any meeting with Duncan in late July or early August concerning commercial butane demand nor could he recall any discussion about laying off employees at Petal. Ray testified that he was not consulted by Duncan, nor did he provide any "input" to Duncan about either the July or August layoffs.

Davis wrote Farrell advising of the names of the four drivers to be laid off on August 8, on the basis of seniority, and then called Farrell and instructed him to take no action until he, Davis, would be present to talk with the drivers on Monday, August 8. The letter did not specify the nature of the layoff other than that it was necessary in order to "normalize drivers' earnings." Farrell rather than Davis advised the four of their layoff on August 8. Davis spoke to two of the four about their possible interest in a job with the Cango affiliate. Joe Faggard and Boyd Davis, two of the four laid off at that time, testified that when they were informed of their layoff by Farrell he stated that work had slacked off necessitating the additional layoffs. Boyd Davis asked Farrell whether this was another one of those temporary layoffs and Farrell responded that it was. Farrell indicated that the drivers would be called back according to seniority but he could not say when this would be.

The drivers in layoff status attended the meeting conducted by President Duncan for Petal terminal employees on August 23, preceding the election. Present for the Company were Duncan, Davis, Thomas, and Farrell. At this meeting Duncan informed employees that Respondent did not need a union and that he "would do everything in his power to keep the Union out." Duncan denied testimony that he stated he could "drag this out" as long as he wanted to and there was not anything that anybody could do about it. Duncan admittedly stated that a reason for the layoffs was that the Company was shipping more of its products by rail and did not foresee any more of the product being hauled out of Jay, Florida, by truck. Also, Duncan stated that the Company

[42] One driver testified he was interviewed by Tipton on August 19, others indicated they did not hear anything further of such interviews.

[43] Admittedly, Duncan did not know how much actual truck movement would be lost to the Petal terminal as a result of the Jay shipping changes.

[44] Well injections of commercial butane continued through August at Petal after which withdrawals from the wells began.

[45] Duncan testified that he knew about the planned movement of the Jay products to Mont Belvieu fractionation plant of Respondent for several months before July 11 and that it was an event which occurred in June. Respondent's records reflect that this movement began in April and that it also had occurred in 1976 without occasioning a layoff at the Petal terminal.

[46] Like McAdams, Caskill was not presented as a witness. No reason therefor was given.

[47] Duncan also testified that he did not obtain any figures from Davis. Davis had recorded on a yellow legal pad some figures, which he testified he computed from a payroll printout, showing income for Petal's 16 drivers for the four pay periods before the July 18 layoffs and figures for the post-layoff period of July 20–29, which included the time while Amerada-Hess was still shut down on its annual "turnaround." These figures revealed to Davis that drivers were making less money after the layoff than they were before. Davis made no check of the figures given him by the payroll clerk. Nor did he take into consideration the fact that several of the drivers did not work during the 10-day period after the layoff. No check was made of dispatch records to determine what work would have been available in the Petal area. Further, Davis did not recall handing Duncan a copy of these figures. He testified that he might have given a copy to Duncan's secretary. No studies were made after the Amerada-Hess resumption to reflect so-called normal Petal operation, nor was anything prepared indicating a survey was made of product volume normally available for Petal drivers.

was trying to get the number of drivers at Petal down to a level where those working would be making earnings equal to what they had made before July. Duncan informed employees that because of complaints Respondent had held several meetings concerning the profit-sharing plan setup which restricted participants' withdrawals of shares and that Respondent was seeking an amendment permitting withdrawals without leaving Respondent's employ.

At the end of the speech Duncan allowed questions. One of the laid-off drivers, many of whom attended uninvited, asked Duncan if they could arrange to "keep up" their insurance since they were in a temporary layoff status. Duncan is quoted as replying that, "in the first place, the drivers were not temporarily laid off." They were "laid off," and the questioner could take that as "terminated, laid off or any way he wanted to." Duncan was also quoted, but denies saying, "temporary, permanent, fired, laid off; it all means the same thing." Another of the drivers asked Duncan if the layoffs had not been temporary and Duncan replied "call it temporary, call it permanent, call it what you want to." Also a driver in layoff status asked whether they would be able to vote in the election. Duncan advised that only drivers in the employ of Respondent on the day of the election would be eligible to vote. Laid-off drivers informed Duncan they intended to vote and he stated that their votes would be challenged. Laid-off drivers testified that this was the first time they were told that the layoffs were permanent. Duncan admitted that laid-off drivers stated at the meeting they had understood the layoffs were temporary.

After the meeting, in the presence of other company officials and several of the other drivers, Boyd Davis, who had high seniority among those in layoff status, approached Duncan, mentioned the fact that a driver had quit to go into business for himself the previous Saturday, then asked Duncan when Respondent would call back a driver to fill the vacancy. Duncan informed Boyd Davis "not this week, not until this mess is over." Duncan testified he could not recall any conversation like the Boyd Davis version but that outside after the meeting he did tell drivers they would be called back on a seniority basis as, and when, Respondent needed them.

Since 1975 there have been yearly exchange agreements between Respondent and Exxon with memoranda and oral supplements in the implementation thereof. Basically these agreements required Respondent to accept the commercial butane produced at Exxon's Jay, Florida, and Escambia plants[48] in exchange for normal butane to be delivered by Respondent to Exxon's refineries, including Exxon's Baton Rouge plant and the Diamond Shamrock Storage facility at Mont Belvieu, Texas. After fractionation, 60 percent by volume of commercial butane feed stock is normal butane. This is used by refineries for gasoline production. Although not spelled out in the exchange agreements, by understanding and practice of the parties, the excess of commercial butane from Jay over Exxon's refinery requirements for normal butane was delivered back to Exxon for use at its Baton Rouge plant as commercial butane. In February 1977 the Diamond Shamrock Storage was added to the agreement as another delivery point for excess commercial butane and a March 1977 letter added Exxon's Baytown refinery as a delivery point for normal butane. The April 1, 1977, exchange agreement also designated in writing Baton Rouge as a redelivery point for commercial butane. In the 1978 agreement redelivery of commercial butane no longer appears in writing.

In March 1977, Exxon advised both Respondent's office and its president, Duncan, personally that the Baton Rouge plant had sufficient commercial butane from other sources and that Respondent would not be called upon to deliver this product for the refinery there. This released additional commercial butane to Respondent for the fractionation and profitable resale of what they would normally supply to the Exxon Baton Rouge plant from Exxon's Jay plant productions.

While claiming that these changes were the cause for the layoffs, Respondent explains the delay in transport drivers layoffs from March when it had definite knowledge of the discontinuance of deliveries of commercial butane to Baton Rouge until July when it laid off the Petal drivers, on the ground that purportedly it could not have fulfilled its commitment for deliveries in the Louisiana, Mississippi, and Alabama area if it had laid off 16 or even 12 drivers at Petal, Eunice, or Port Allen.

It appears from Respondent's records that shipment of commercial butane by rail car from Jay to Mont Belvieu had existed long before Exxon's March 1977 change in requirements. Such shipments were made from February through September 1976, stopped from October through March 1977 when because of demand all of the product was being sent to Baton Rouge and other named locations in Illinois, Kansas, and Oklahoma. It further appears that Respondent resumed such shipments again in April at a rate less than comparable to the volume shipped to Mont Belvieu in 1976.[49] The lesser volume was attributed to the necessity in June and July 1977 of diverting some rail tank cars, originally assigned to go from Jay to Mont Belvieu storage, to Petal because rail tank cars were temporarily backed up in Mont Belvieu tying up Respondent's supply of rented rail tank cars and causing Respondent to incur freight demurrage charges and hazardous storage charges.

[48] Also in 1975 Respondent purchased by agreement from those same Exxon plants the "contaminated" propane production (not saleable because it contained carbonele sulphide or COS) and brought it to the Petal "scrubber" which converted it to purity specifications for resale. "Scrubbers" were later installed at those Exxon plants during the fall of 1975 and early in 1976—eliminating this "off-specification" arrangement with Exxon.

[49] Rail car shipments of commercial butane from Jay to Mont Belvieu in gallons were:

1976	*Gallons*	*1977*	*Gallons*
Feb.	771,004		
Mar.	1,257,540		
Apr.	1,823,768	Apr.	970,172
May	2,714,907	May	1,405,954
June	2,492,996	June	1,060,580
July	2,366,791	July	2,194,226
Aug.	3,365,812		
Sept.	1,539,126		

The Eunice, Louisiana, terminal was Respondent's first in the area. This terminal has no loading or unloading racks for either rail cars or trucks and no storage either above or below ground. It was originally set up to service Baton Rouge, New Orleans, and Lake Charles areas where several large refineries are located. The Petal terminal has a shop for truck maintenance, a dispatch office, tank truck, and tank car loading and unloading facilities, underground storage wells, a dehydrator system, a COS treater or "scrubber," and a pipeline connection with Dixie Pipeline through which Respondent ships and receives propane from and to storage. Petal's trucking service covers southern Mississippi, Louisiana, northern Florida, and Alabama. It services Amerada-Hess at Purvis, Mississippi, with which Respondent has a long-standing exchange-purchase agreement, and also services plants at Goldwater, Escambia, Jay, Gilbertown, and Hatters Pond, among others. After Petal was established, Eunice became its backup for handling the Amerada-Hess refinery products. Port Allen has a maintenance shop, dispatch office, and fuel tanks for its equipment motor fuel only. It has no loading or unloading facilities for tank cars or trucks. This terminal is jointly operated by Respondent with one of its common carrier subsidiaries, Holister, and was set up last to assist in the workload of trucking for both Eunice and Petal. It services some south Louisiana refineries.

Although the Eunice and Port Allen terminals serviced roughly the same geographic area as Petal and were considered the backup service for Petal terminal work, and despite the fact that at both Port Allen and Eunice Respondent, as needed, used drivers of its common carrier subsidiary Holister to carry some of Respondent's products, there were no layoffs of Respondent's driver complement instituted at those backup locations and no withdrawal of work from drivers of the affiliate companies. Instead the terminal complement remained within normal fluctuation range. Indeed, Respondent continued to utilize Holister drivers at those locations. Moreover, Respondent's records show that total mileage driven at Port Allen and Eunice terminals for Respondent sharply increased in August 1977 compared to the same month the preceding year whereas Petal mileage experienced a precipitous drop, although the total area mileage driven increased for the 1977 month compared to 1976.

Respondent emphasizes the loss of work to Petal because of the loss of Baton Rouge business. Its own dispatch load analysis shows that Baton Rouge deliveries involved less mileage for Port Allen drivers than for Petal drivers. If, as Respondent asserts, the mileage is a significant cost factor considered in assignment of loads, it would seem that Port Allen would have been the terminal assigned to such dispatches and consequently the one, rather than Petal, experiencing any loss of business occasioned by cessation of deliveries to Baton Rouge.

As noted, both the Port Allen and Eunice terminals continued to haul commercial butane without a reduction of drivers after the Petal layoff. Admittedly, no studies were made of Respondent's needs at those terminals even though the assignment of dispatch trips to these as well as to other terminals of Respondent, like those of Petal, are made at the central scheduling and routing division at Houston headquarters. Nor did the alleged lack of demand for this product in the Louisiana area and the alleged filling of the wells at Petal bring about layoffs among Petal's storage personnel or in the maintenance shop. In fact, some hiring took place shortly thereafter in both departments.

Daniel Carter, an employee laid off on July 18, testified that over the period of time when he was discussing with Farrell moving to Hattiesburg, Mississippi, and taking employment with the Petal terminal of Enterprise at the end of 1976, the subject of the steady character of the work at the terminal was brought up several times because this was a concern for him in leaving his present employment. Farrell assured him that despite a normal summer slowdown "their trucks run full summer." Their series of interviews continued until April 6 when Carter reported to work. At that time in April, Farrell reassured Carter "there wouldn't be any [summer slowdown of work] that the wells were empty and it would take the full summer running to fill them back up for the next winter."

As previously noted evidence presented by Respondent indicates that all product movement and all terminal work assignment are made in Houston. There a department keeps in regular contact with the various plants Respondent services receiving daily reports on production and destination, and by coordinating this information the department personnel contacts the appropriate terminals with the schedule for the following day's dispatches. Thus, Farrell does not have access to such business projections. However, as he was the terminal manager at Petal since it was established, he could speak from past experience and his knowledge of the current status of storage wells.

In addition to the Petal underground storage, Respondent leases storage capacity from other companies including Mobil at Hattiesburg, Mississippi, and owns six underground storage wells in Arcadia, Louisiana, where it stores only propane and normal butane. Respondent's records show that at its Petal storage it has nine wells. Well No. 9 was completed in December 1976 with an estimated capacity of around 17 million gallons, but no assigned content. In January 1977, well No. 8, with a capacity of 8 million gallons, was being washed. Wells Nos. 7 and 6, with capacities of 24 and 48 million gallons respectively, were committed to other products. Well No. 5, with a capacity of nearly 17 million gallons, contained some propane mix while well No. 4, with a capacity of 26 million gallons, was earmarked "Jay." Well No. 3, with over 10-million gallon capacity, was the only well at that time committed to commercial butane. Well No. 2, with over 22-million gallon capacity, and well No. 1, with an estimated 25.9-million gallon capacity, were committed to other products.

In January 1977, upon completion of the well No. 8 wash, 1.2 million gallons of commercial butane were transferred from well No. 3 into well No. 8. On March

5, well No. 1 was emptied of propane and on March 9, well No. 5 was emptied into well No. 1. Well No. 5 was then opened to commercial butane storage with the transfer of 500,000 gallons from well No. 3, which emptied that well. Well No. 3 remained empty until July 10 when commercial butane was again injected. Commercial butane accumulated in that well until July 14, when the contents was emptied into well No. 8, after which well No. 3 was designated to receive propane and well No. 9, which had remained empty, was designated to receive commercial butane.

Thus, contrary to Respondent's contention that its Petal capacity for commercial butane storage was nearly full, its records show that during July and early August 1977, the crucial period herein, it had well capacity assigned to commercial butane, not including well No. 8,[50] totaling approximately 34 million gallons and that it had in the designated storage wells no more than roughly 16.8 million gallons, not including the 2.3 million gallons trapped in well No. 8. Indeed, the storage of commercial butane never came near Respondent's own designated well capacity, and seasonal demand returned well No. 9 back to empty by November 15 of that year.

As proof that it regarded the layoffs as permanent from the outset, Respondent emphasized that laid-off employees were permitted to withdraw their shares, and in fact received their money in about a month after the layoff whereas under its profit-sharing plan an employee could not withdraw his share "unless he was terminated, quit or died." Assertedly, this provision was amended subsequent to the layoffs.

Respondent's profit-sharing plan, as amended effective January 1, 1976 (art. VIII, sec. 8.3), permitted withdrawals upon the participant's 10th anniversary in the plan; upon attaining retirement age; and upon severance of the employment relationship. The plan was amended effective January 1, 1977 (art. XV), to add provisions for withdrawal once a year, after 1 year as a participant, of 100 percent only, on a 30-day notice, but barred reentry into the plan for two quarters thereafter. Although effective January 1, 1977, the document memorializing this amendment and presented in evidence indicates that it was executed on December 5, 1977. Even if this is an accurate date for the signing of the formal document, it is by its terms clearly effective from January 1, 1977. Further, I note that internally the document refers to an example for the application of this very provision, and in doing so gives April 1, 1977, as the date upon which a fictional participant withdraws his shares. It is reasonable to conclude that, although the revised plan was not yet drafted in its final form as a completed document containing all changes, the withdrawal changes were decided upon and became effective at a time before April 1, 1977. Otherwise the example given in the document as an explanation of how the revised plan would apply would have instead stated an impossibility. Such an agreed-upon and effective change would presumably be within the knowledge of Respondent's officials on July 18, even though it had not yet been announced to employees. Duncan admits telling employees at the August 23 meeting that several meetings had been held with respect to the provisions of the profit-sharing plan and that changes therein were forthcoming. Duncan is a trustee of the plan. Presentation of his activities between July 1 and August 8, supported by his diary, indicate that he was fully occupied with other matters, none relating to the pension plan, thus indicating that the "several meetings" he mentioned in his August 23 speech must have taken place before the layoff decision was made.

I am not persuaded that Davis' offer to try to speed up requests for withdrawal of shares in the profit-sharing plan on July 18 supports Respondent's claim that the layoffs were permanent.

Respondent presented elaborate evidence relating to existing pipelines and those planned or under construction by Respondent's subsidiary or by other oil companies. President Duncan indicated his own awareness of these. However, the status of existing or planned pipelines as an available means of transporting the various gas products handled by Respondent was not included as having a bearing upon the decision to institute the July-August layoffs either in the reasons given to employees by Davis or those claimed by Duncan as the reasons for his layoff decision. I therefore see no necessity for presenting an analysis of that evidence.

Similarly, no purpose would be served by detailing the evidence relating to the various facilities being constructed in the areas of Respondent's operations such as additional fractionation and gas processing plants, "scrubbers" and refineries being built by Respondent, its subsidiaries, or other oil companies, with which Respondent has or is negotiating agreements.

Initially, I note that employees were given as reasons for the layoff which by his own declaration were not considered by Duncan, the official of Respondent who made the layoff decision. This divergence would suggest that either the real reason was not so clear-cut as Duncan insists or the real reason was being concealed.

As for the reasons for the layoff claimed by Duncan, the record establishes that the tank car movement of commercial butane from the Exxon Jay plant to Mont Belvieu was not a new experience as it had taken place roughly the same months the preceding year without the impact of a layoff, as had the Baton Rouge diversion. Moreover, Respondent officials, including its president, had knowledge of this planned move some 4 months in advance. Thus, if on this occasion the change in shipping pattern had such an impact upon the work availability for Petal drivers there is no indication of why any required adjustments could not have been planned in an orderly fashion well in advance,[51] rather than the sudden action Duncan claimed to have required immediate action upon receipt of the Union's recognition claim.

[50] It appears that, after its January washing, the product injected into well No. 8 became trapped and Respondent was unable to bring the product back out. Respondent tried various methods including rewashing but finally made a book transfer of the lost commercial butane to well No. 9.

[51] The evidence reveals that Respondent operates on the basis of a supply/demand forecast which is a moving 15-month projection of business activity. Respondent updates this monthly to reflect appropriate adjustments.

Further, Respondent's evidence fails to establish the claimed lack of demand for its product in the south Louisiana area beyond adjustment for seasonal fluctuations, which had never before required layoffs at Petal. Indeed, a plant had been added in the area which Respondent supplied. Further, since south Louisiana was also serviced by the Port Allen and the Eunice terminals where Respondent enlisted drivers from a subsidiary affiliate, as needed, there are is indication why any lack of demand in the area would not affect those terminals as well as Petal. Yet they were not even considered for cutback or layoff and their mileage of trucking increased while that of Petal's drivers precipitously fell. Since all assignments of the area work as between these three terminals are determined centrally by the Houston office, it was easy for officials of Respondent there to divert the bulk of the available assignments away from Petal as the figures suggest was done. Moreover, those figures show an increase in the total mileage requirements for the area compared with the preceding year. Clearly, the seasonal impact in the area was not noticeably aggravated by the Jay-Exxon diversions. The General Counsel, in his brief, has compiled details of rail tank car dispatch and arrival, tank truck mileage changes, and destination changes which arguably provide specific evidence of change which came about because of the layoff Decision rather than vice versa. I do not reject the citations to Respondent's records nor do I reject the conclusions he suggests. Rather, I believe it unnecessary to burden this Decision with added detail to support my conclusion herein.

Nor, as pointed out above, does the evidence support Respondent's claim that the storage capacity at Petal was full or even about to be filled. Instead, those records reveal that there was plenty of assigned capacity as one would expect since the very purpose of storage is to accumulate a product during slight demand in order to have it available during peak demand. And, indeed, deliveries to storage of commercial butane continued until seasonal demand created a withdrawal balance.

I conclude that none of the reasons for the layoff decision given by Duncan, or those given by Davis to employees, were the real reasons for the layoff decision. The haste with which Duncan, upon learning of the Petal union activity and while investigating its impact upon other terminals and sending its refusal of recognition, all within the same day, concluded that an immediate layoff of Petal drivers was necessary without any supporting business reports or even an inquiry at knowledgeable sources clearly indicates the causal relationship and illegal motivation for the layoffs.

On the basis of the foregoing, I am convinced that the layoff decision made on July 11, 1977, by Duncan was motivated by a desire to discriminate against Petal employees in retaliation for their union activity and that Respondent's purpose was to interfere with its employees' Section 7 rights, to restrain them in the exercise of those rights, to coerce them, and to discriminate against them in their tenure of employment in order to defeat the Union in the forthcoming election. Accordingly, I conlude that Respondent violated Section 8(a)(1) and (3) by its July 18 layoff of 12 Petal drivers.

The evidence establishes that Duncan decided on July 11 to institute a further layoff with only the question of how many Petal drivers would be affected. Again no studies or evaluation of business conditions was made. Indeed, Duncan did not even wait to review and consider the incomplete study he had requested of Davis, but used a fictional formula created from his own guesses of what "permanent" business Petal might have and reached his conclusion on how many more Petal drivers would be laid off. He did all of this on a plane while returning to Houston from another trip.

Duncan's conduct in this respect further underscores the falseness of the reasons advanced for his decision which Duncan claimed was to give the remaining drivers a living wage. When the decision was made on July 11 to have a further layoff, no consideration of the state of drivers' earnings was even claimed, and when Duncan was working out this formula he had not even seen the partial study Davis was working up. These circumstances establish that the resulting August 8 layoff of four more Petal drivers was with the same motive and for the same purpose as the July 18 layoffs and constituted a further violation of Section 8(a)(1) and (3) of the Act.

Further, I find on the basis of the credited testimony that both layoffs as initially instituted were temporary in nature, intended to last "until this mess is over," which remark by Duncan I find violative of Section 8(a)(1) of the Act. It would appear that sometime between the layoffs and the August 23 speech Duncan became aware of the voting rights of employees in temporary layoff status. Therefore, at the August 23 meeting Duncan announced that the layoffs were permanent. I find, as urged by the General Counsel, that this change in the announced nature of the layoffs from temporary to permanent was a further violation of Section 8(a)(1) and (3) of the Act.

Respondent, on both July 18 and August 8, stated its intent to recall the laid-off employees on the basis of seniority. Assertedly, with the August 8 layoff its driver complement was down to the level of its needs. Yet when one of its old drivers quit to go into business for himself on August 21, 1977, less than a week before the scheduled election and less than 2 after the last layoff, Respondent did not recall the senior driver in layoff status. The only apparent reason for this failure of recall is revealed in Duncan's speech 2 days later when he revealed his understanding that only drivers employed on election day could vote and stated his intent that the votes of those in layoff status should not be counted and would be challenged. Clearly, any of the four drivers laid off on August 8 would have been on the eligibility list and if recalled before election day would therefore be eligible to vote regardless of the nature assigned by Respondent to the layoff.

I find that this is the reason for Respondent's failure and refusal to recall the senior driver in layoff status and, in agreement with the General Counsel, find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

L. *The Refusal To Bargain*

The record reveals that on July 1, 1977, the Union filed its representation petition in Case 15-RC-6140, and also forwarded to Respondent its demand for recognition. On July 11, Respondent forwarded a letter to the Union denying recognition by questioning its majority status. The charge in Case 15-CA-6784 alleging violation of Section 8(a)(5) was filed by the Union on February 13, 1978. Respondent claims that this charge is time-barred by Section 10(b) of the Act.

The evidence shows that the Union continued its organizing campaign which culminated in a Board-conducted election on August 26 which was inconclusive because of the number of challenged ballots of laid-off employees. The election was followed by timely objections to conduct affecting the results of the election filed by the Union. The Union also demonstrated its continued interest in representing the employees by filing and supporting numerous unfair labor practice charges beginning with the first charge on July 5, 1977, and by pursuing that course through to the holding of the hearing herein. Such action constitutes a continuing bargaining demand.

It is established Board law that 8(a)(5) charges are not barred by Section 10(b) because they are filed more than 6 months after the initial request to bargain where the demand is a continuing one.[52] The Union's actions in diligently pursuing the representation proceeding and in pressing the unfair labor practice charges establish its demand as a continuing one.[53] Respondent's statutory defense is rejected.

Respondent did not pursue in its brief an argument that the Union made a defective claim based on a variance between the unit claimed in the Union's July 1 demand letter and the unit agreed to in the representation case and set forth in the complaint alleging the 8(a)(5) violation. Nevertheless, I note that the unit described by the Union in its demand was identified as all truckdrivers, operators, and mechanics. The stipulated unit added 3 dispatchers to a unit of 44 making the total of 47 employees. The addition of a classification not mentioned in the demand does not establish that the initial unit request was inappropriate, nor is the addition of three individuals a substantial variance from the bargaining request. Such tailoring of a unit does not make the demand for recognition defective.

I find, in accord with the stipulation of the parties, that the unit covered by the election and set forth in the applicable complaint and described as follows is the appropriate collective-bargaining unit:

> All truckdrivers, dispatchers, operators and mechanics at the Petal, Mississippi facility of the Employer, excluding all office clerical employees, professional employees, salesmen, watchmen and/or guards and supervisors as defined in the Act, as amended.

The parties stipulated that the employees in the unit as of July 1, when the Union made its initial demand, consisted of 29 truckdrivers, 11 operators, 4 mechanics, and 3 dispatchers for a total of 47 unit employees. Including James J. Thomas who was discharged on July 2, 1977, but who remained a part of the unit because, as found above, he was discharged in violation of Section 8(a)(3), there were still 47 employees in the unit when Respondent dispatched its letter refusing to extend recognition to the Union. The General Counsel presented authenticated authorization cards signed by 30 of these 47 employees, 25 of which were signed on or before July 1, and 28 of which were executed and dated before July 26 when the parties stipulated to the expanded unit. Thus, as of the date of the election on August 26, the unit (including the 16 laid-off discriminatees and Thomas) had contracted by one as had the card showing because one card-signing employee had left Respondent's employ on August 21. Therefore, on August 1, 1977, the date of the initial demand and on all other pertinent dates, including August 12, the extent of the reach of the 8(a)(5) charge because of the 10(b) period, the Union held a clear card majority of all of Respondent's employees in the expanded unit.

Respondent's second defense to the unlawful refusal-to-bargain charge is based on its contention that the challenges to the votes of the laid-off employees should be sustained and since the Union did not win a majority in the election Respondent had no obligation to bargain with the Union. Further, Respondent urges that, since the objections to the election are based upon the same conduct as that covered by the charges relating to conduct which preceded the election, like those allegations the objections should be found without merit and dismissed. As my finding is to the contrary, I likewise hold that the election should be set aside and that the challenge to the ballots of laid-off employees should be overruled. However, I shall not recommend that those votes be opened and counted or that a new election be conducted.

As the foregoing record of Respondent's conduct reveals, from the first inkling of union activity by its Petal terminal employees right up to 3 days before the scheduled election, Respondent officials engaged in numerous and repeated violations of Section 8(a)(1) and (3) of the Act, including interrogation, solicitation of grievances, threats to close the terminal, to move the trucks out, to withhold improvements, and to refuse to bargain, giving impressions of surveillance, maintaining an unlawfully broad rule, unlawfully discharging and laying off employees, and other modes of interference, restraint, coercion, and discrimination. Moreover, even after the election; and continuing into the course of this hearing, Respondent showed its disdain for employees' Section 7 rights and Board processes by engaging in further violations of Section 8(a)(1), (3), (4), and (5). Such conduct was neither isolated nor minimal in impact. Indeed, the unlawfully motivated layoffs and discharges directly affected 20 of the remaining 46 employees. The impact of such conduct could not be less than coercive to the others. The massive expanse and egregious nature of the violations engaged in by Respondent would render a fair rerun election impossible. Accordingly, the authorization

[52] See *Darnell Enterprises, Inc.*, 250 NLRB 377 (1980).

[53] See *Independent Sprinkler & Fire Protection Co.*, 220 NLRB 941, 964, fn. 5 (1975), and cases cited therein.

cards now constitute the most reliable gauge of employee choice. Since at all times material herein the Union represented a card majority of the employees in the appropriate unit, Respondent's failure and refusal to grant such continuing demand for recognition constituted a violation of Section 8(a)(5) of the Act, as did its numerous unlawful conduct in derogation of its obligation to bargain. For this reason, and without regard to the intervening representation petition, in the circumstances of this case the Union is entitled to a bargaining order. In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the United States Supreme Court held that a bargaining order would be appropriate in a situation where an employer engages in unfair labor practices which undermine and impede the election process and the employee choice once expressed through cards would be better protected by a bargaining order.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged James J. Thomas on July 2, 1977, in violation of Section 8(a)(3) of the Act; that Respondent laid off temporarily, and later changed to permanent, on July 18, 1977, employees Dan Bickham, Jack Blackburn, Paul Blackburn, Daniel Carter, Abner Davis, Charlie Daw, Maurice Dickens, Steve Diem, Tommy Holden, H. Dale Purvis, Billy Reid, and Ray Williams, and on August 8, 1977, employees Boyd Davis, Joe Faggard, Joe Shows, and Howard Stevens, in violation of Section 8(a)(3) and (1) of the Act; and that Respondent discharged on August 20, 1977, reinstated on September 13, 1977, and again discharged on October 4, 1977, employees James T. Rouse, Lowell Mayfield, and Dennis Thornhill, in violation of Section 8(a)(4), (3), and (1) of the Act,[54] I recommend that Respondent be ordered to reinstate them to their former positions or, if no longer available, to a substantially equivalent position, without prejudice to their seniority and other rights and privileges; and make them whole for any loss of earnings or other monetary loss they may have suffered as a result of the discrimination against them, less interim earnings, if any. The backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).[55]

Having found that the number and extent of the unfair labor practices engaged in by Respondent are of such egregious and widespread dimension as to demonstrate a general disregard for its employees' fundamental statutory rights and to make a free expression of choice impossible, I shall recommend a broad order to include injunctive language against the further commission of any unfair labor practices by Respondent, in accord with *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and shall recommend that Respondent be required to recognize and bargain with the Union under *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 614–615 (1969), as the exclusive collective-bargaining representative of a majority of its employees in the appropriate unit described above, without regard to the time limitations of Section 10(b).

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act, and is the statutory bargaining representative of the employees of Respondent in the following appropriate unit:

> All truckdrivers, dispatchers, operators and mechanics at the Petal, Mississippi facility of the Employer, excluding all office clerical employees, professional employees, salesmen, watchmen and/or guards and supervisors as defined in the Act, as amended.

3. Respondent independently violated Section 8(a)(1) of the Act by coercively interrogating employees concerning their own and union activities of other employees; giving the impression of surveillance; soliciting grievances, threatening to close the facility, to move the terminal, to move the trucks out, to withhold planned benefits, with a less favorable working relationship, and not to bargain with the selected representative; soliciting employees to report on the union activities of other employees; promising benefits; maintaining in effect and enforcing an unlawfully broad rule which restricted communication concerning union activity; and by stating that laid-off employees would not be recalled until union activity ceased.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging James J. Thomas and laying off temporarily, then changing to permanent 16 named employees and by failing and refusing to recall laid-off employees for unlawful reasons.

5. Respondent violated Section 8(a)(4), (3), and (1) of the Act by twice discharging three named employees because it suspected that they violated the unlawfully broad rule by supplying information to the Union and thence to the Board for prosecution of this case.

[54] I find no merit in Respondent's contention that reinstatement should be denied these three employees because they were suspected of theft of Respondent's business property; namely, the information they were accused of conveying through the Union to the Board. Respondent's labeling this as a theft does not bring it within the conduct considered by the Board as causing them to become unemployable.

[55] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

6. Respondent violated Section 8(a)(5) by failing and refusing to honor the Union's claim to recognition as majority representative of the employees in the appropriate unit.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record[56] and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[57]

The Respondent, Enterprise Products Company, Petal, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging assistance to or membership in Teamsters Allied and Industrial Workers, Local No. 258, or any other labor organization, by discharging, laying off, refusing to recall, or otherwise discriminating against any employees with respect to hire, tenure, or any term or condition of employment.

(b) Interfering with the Board processes by discharging employees suspected of supplying information to the Board for the prosecution of a case.

(c) Interfering with, restraining, and coercing employees in the exercise of their Section 7 rights by interrogating employees concerning their own and the union activities of other employees; giving the impression of surveillance; soliciting grievances, threatening to close the facility, to move the terminal, to move trucks out, to withhold planned benefits, with less favorable working relationships and not to bargain with the selected representative; soliciting employees to report on the union activities of other employees; promising benefits; maintaining in effect and enforcing an unlawfully broad rule which restricted communication concerning union activity; and by stating that laid-off employees would not be recalled until union activity ceased.

(d) Refusing to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of:

> All truckdrivers, dispatchers, operators and mechanics at the Petal, Mississippi facility of the Employer, excluding all office clerical employees, professional employees, salesmen, watchmen and/or guards and supervisors as defined in the Act, as amended.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer James J. Thomas, Dan Bickham, Jack Blackburn, Paul Blackburn, Daniel Carter, Abner Davis, Charlie Daw, Maurice Dickens, Steve Diem, Tommy Holden, H. Dale Purvis, Billy Reid, Ray Williams, Boyd Davis, Joe Faggard, Joe Shows, Howard Stevens, James T. Rouse, Lowell Mayfield, and Dennis Thornhill immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges and make them whole for their loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Recognize and, upon request, bargain with Teamsters Allied and Industrial Workers, Local No. 258, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the appropriate unit of all truckdrivers, dispatchers, operators and mechanics at the Petal, Mississippi, facility of the Employer, excluding all office clerical employees, professional employees, salesmen, watchmen and/or guards and supervisors, as defined in the Act, respecting rates of pay, wages, hours, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its Petal, Eunice, and Port Allen terminals[58] copies of the attached notice marked "Appendix."[59] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[56] In the absence of objections thereto, the General Counsel's motion to correct the record is hereby granted.

[57] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[58] Because the work at these two additional terminals is related geographically and interchangeably with that at Petal and they may be affected by compliance with this Order, I deem it appropriate that they should have notice of this case.

[59] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."